Supreme Court, U.S.
FILED

011685 MAY 13 2002

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No. 01-

IN THE

Supreme Court of the United States

RHADAMES CHAVEZ,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORPORATION; SIGNAL MUTUAL INDEMNITY ASSOCIATION; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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91 pg

QUESTIONS PRESENTED

1. Whether when a ruling by the administrative law judge that an injured employee is fully recovered is based on an employer-sponsored examination, the employee has been refused treatment by the employer and is entitled to reimbursement of reasonable medical expenses incurred for continued treatment with employee's physician authorized by the employer pursuant to Sec. 907 under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.A. § 901 *et seq.*

2. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, under permanent partial disability relating to loss of use of a body part, what factors determine whether benefits are calculated under 908(c)(19) or (c)21?

3. Whether it is a violation of due process for review boards in the federal system to remand a case to the same administrative judge. Is there not a presumption of vindictiveness or loss of objectivity on the part of the reversed judge?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rhadames Chavez, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals denying the Petition for Review of the Benefits Review Board is in the Appendix (App.) 1a-5a. The unreported Benefits Review Board opinions first remanding and then affirming the administrative judge's decision are reproduced at App. 8a-16a and App. 26a-33a. The unreported opinions of the same administrative law judge pursuant to the first hearing and on remand from the Benefits Review Board are reproduced at App. 17a-25a and App. 34 -66a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on November 19, 2001 and denied rehearing en banc on February 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTE INVOLVED

The provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, relevant to this petition are set forth below:

Sec. 907(b):

The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided . . . Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

Sec. 907(c)(2):

Whenever the employer or carrier acquires knowledge of employee's injury, . . . as prescribed the Act, the employer or carrier shall forthwith authorize medical treatment and care from a physician selected by an employee pursuant to subsection (b) . . . An employee may not change physicians after his initial choice unless the employer . . . has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the comprehensible injury or disease. . . .

Sec. 907(d)(1):

An employee shall not be entitled to recover any amount expended by him for medical or other treatment services unless –

(A) The employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) and the applicable regulations; . . .

Sec. 908(c) Permanent partial disability [schedule].

Sec. 908(c)(19):

Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

Sec. 908(c)(21) Other cases: . . .

STATEMENT OF THE CASE

Petitioner Rhadames Chavez (Chavez) suffered an admitted accident pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA or Act) and could not work from March 14, 1996 (except for three days when he tried to work) until June 17, 1996.

On March 11, 1996, while petitioner was working on the docks, a big chunk of ice fell from a high crane and struck petitioner Chavez on the back of his neck and right shoulder area. Petitioner stated he momentarily blacked out by the big impact.

Prior to the accident on March 11,1996, petitioner never had any problems with his neck, shoulder, arm or hand and never had medical treatment for these areas. Prior to March 11, 1996, petitioner, during his 32 years on the docks, never missed any work for problems related to his neck, shoulder and arm or hand. However, after petitioner was injured by the impact of the big block of ice on March 11, 1996, he suffered neck, right shoulder and arm injuries that extended through his hand.

On this March 11th, petitioner notified his supervisor of the accident and his injuries and pain. Petitioner tried to work with the pain for another two to three days. Petitioner Chavez wanted to work. However, the pain became worse with each day, swelling occurred and his right hand would cramp up and get numb. Petitioner could not continue working. He testified that "it was not his intention to apply for anything [disability] but the fact that the injury wouldn't let him work forced him to seek medical attention".

Petitioner's duties included those of a hatch checker which among other things involved verifying the numbers on containers for accuracy that are loaded and unloaded on a vessel as they moved passed him at a steady pace while he was inside or outside a booth. He wrote down numbers and other information. He used a hand-held radio to communicate with the crane operator. As a sender (field operator), his duties included giving verbal commands and hand signals after he verified the container numbers. He also drove fork lifts and trucks and performed other duties. Petitioner's main duties required the complete movement of his head, shoulder areas, arms and hands.

On March 14, 1996, petitioner selected Dr. Guillermo Munoz as his treating physician pursuant to Sec. 907(b) of the Act. Petitioner advised Dr. Munoz of the severe pain on his neck, right side, headaches and sleeplessness over the pain, and cramping and numbness of this hand and restrictions of movement. The swelling persisted. Petitioner experienced troublesome sensations in his fingers which rendered him unable to write or grasp. Dr. Munoz found acute severe spine strain, acute severe right shoulder sprain, cervical radiculothopy and later (below) carpal tunnel syndrome. Dr. Munoz treated petitioner with heat, pain medication and physical therapy.

While petitioner was in the care of Dr. Munoz, on April 1, 1966, the employer sent petitioner to Dr. Steven L. Nehmer. Petitioner did not refuse this employer-sponsored examination. Dr. Nehmer recorded restrictive movement in the neck. The doctor found that petitioner was diffusely tender to light touch in the neck and shoulder area. Dr. Nehmer stated that petitioner complained of persistent pain on the right side of the neck and shoulder. Petitioner advised Dr. Nehmer of some improvement with the physical therapy. Dr. Nehmer stated in his deposition that he did not believe that a person if hurt seriously would wait three days to seek medical attention as did petitioner. Dr. Nehmer in his deposition accused petitioner of symptom magnification. Dr. Nehmer believed that petitioner was able to work as of April 1, 1996, the day of the examination, and did not require further treatment.

After Dr. Nehmer's examination, on April 26, 1996, Dr. Munoz conducted nerve conduction tests and determined that petitioner Chavez suffered from carpal tunnel syndrome on both sides. Prior to March 11, 1996, petitioner did not suffer pain indicative of carpal tunnel syndrome. Petitioner tried to return to work on April 30, 1996 but after three days on the job just could not continue. The pain was so severe. While doing his job, besides the pain, he testified he "had trouble twisting his neck when he was looking for containers and he had cramps in his hand when writing with the pencil." He rubbed his right hand because his fingers became numb. It was difficult to do his job.

On May 10, 1996, petitioner received written authorization pursuant to Sec. 907(c)(2) on Form LS-1 for treatment by Union Country Orthopaedic. Petitioner determined that Dr. Munoz was not the appropriate specialist

to treat his injuries. The employer checked off Box A of the LS-1 form which states that the doctor chosen is to provide medical services to the employee as follows:

> A. If you [doctor] believe the condition is related to injury, furnish office and/or hospital treatment as necessary for the effects of this injury.

Beginning May 14, 1996, after receiving authorization, petitioner was treated by Dr. Douglas Bradley, an orthopedic surgeon, of the Union County Orthopaedic. Petitioner related his pain and problems in his right arm and the pulling and irritation from his middle finger running all the way up the arm. Petitioner testified that he had to rub his right hand because it became numb and of the shooting pain. Dr. Bradley noted tenderness over the right trapezius muscle and limited movement motion. The doctor prescribed medication and an MRI.

On May 21, 1996, Dr. Bradley concluded from the MRI that petitioner's injury aggravated pre-existing changes. The MRI showed evidence of multi-level degenerative disc changes throughout the cervical spine; mild bursal surface fraying involving the right shoulder and of a prior Hill-Sachs fracture. Dr. Bradley prescribed a formal rehabilitation program.

Again, on June 3, 1996, employer sent petitioner to Dr. Nehmer for another employer-sponsored examination. Petitioner did not refuse this examination. Petitioner told Dr. Nehmer that his condition improved with physical therapy. Dr. Nehmer noted evidence in the right hand of paresthesias which is a prime symptom of carpal tunnel syndrome. Dr. Nehmer stated that although there was a

temporal connection of carpal tunnel syndrome with the injury, he opined that there was no causal connection. Dr. Nehmer also noted a decrease in pain and the increase in range in motion of the neck compared to April 1, 1996 when he first examined petitioner. He acknowledged that physical therapy may have been a factor in these changes, time, or petitioner's "decrease in symptom magnification." App. 52a.

In June 11, 1996, Dr. Bradley noted improvement with the therapy. Dr. Bradley who was authorized to treat petitioner released him to return to work on June 16, 1996 and continued to treat him through February 1997. On February 2, 1997, Dr. Bradley noted more pain, worsening of numbness of petitioner's index and middle fingers and increased pain on the base of his neck. Dr. Bradley ordered more testing. Petitioner continued to have pain, restrictive movement and numbness.

On July 8, 1996, (petitioner had returned to work on June 17, 1996), petitioner was examined by Dr. Raymond Koval from the U.S. Department Of Labor. Dr. Koval's report noted tenderness on the right side of neck-shoulder and upper trapezius fibers on the right as did the treating physician, Dr. Bradley. In reviewing the MRI, Dr. Koval did note degenerative changes at C3-C4, a Hill-Sachs fracture and shoulder indications. Dr. Koval concluded in his report that he "did not see any evidence of any carpal tunnel syndrome whatsoever and [anyway] how such an injury could cause carpal tunnel syndrome". Dr. Koval contradicted Dr. Nehmer as to whether there was any carpal tunnel syndrome and a Hill-Sachs fracture. On July 8, 1996, Dr. Koval concluded that petitioner had no work-related injury.

During his deposition, Dr. Nehmer was shown a electrodiagnostic study and MRIs of petitioner's cervical spine requested by treating specialist, Dr. Bradley, conducted in February 1997 for interpretation. Dr. Nehmer, contradicting Dr. Koval, did find evidence of carpal tunnel syndrome but no Hill-Sachs fracture.

At the request of petitioner's counsel, on October 2, 1996, Dr. William Tevlin and Dr. David H. Myers conducted a consultative examination of petitioner several months after the accident. The doctors found injury to the cervical spine and shoulder and reduction in movement. They concluded that their objective findings reveal a permanent orthopedic disability of 21% impairment of the whole person.

Petitioner worked at his regular job as hatch checker and sender until November 1997. The employer transferred him to the receiving and delivery office for making errors which cost the company money. Petitioner testified he was not as quick as he used to be because of his injury and he did make errors. He wanted to remain at his original job but he could not keep up. Petitioner continued to have pain in his shoulder, arm and hand, numbness, and movement limitations in his new position. In his affidavit dated October 5, 1999, petitioner explained his permanent injuries involving pain in his neck and right shoulder, cramps on his right hand, and loss of strength in his hand and restrictive movement.

Based on the first employer-sponsored examination report by Dr. Nehmer, respondents cut-off petitioner's medical and disability benefits in the middle of authorized treatment on April 1, 1996. This cut-off date was while petitioner was being treated by Dr. Munoz and later

by Dr. Bradley. On May 10, 1996, the employer had given written authorization for continued treatment with Dr. Bradley.

Since informal resolution attempts failed, a hearing was conducted before an administrative law judge (ALJ). The respondents relied on the employer-sponsored report of Dr. Nehmer and the medical report of Dr. Koval, the examiner from the Labor Department, to rebut evidence of petitioner Chavez's claim of injury after April 1, 1996.

At the administrative hearing held on January 13, 1998, petitioner related the problems he suffered to that day due to the injuries. At the hearing, he told of the present day cramps on his hand and a sense of electrical shocks going through his fingers and the pain from his right shoulder.

The ALJ gave great weight to the employer-retained Dr. Nehmer's analysis stating that after "review of the [deposition] testimony of Dr. Nehmer, I find him to be creditable, and accord his opinion [,] that Mr. Chavez was exaggerating his symptoms[,] great weight". App. 53a. As to Dr. Koval, ALJ stated that "I give Dr. Koval, the independent medical examiner's medical opinion great weight, he reported objectively, listing positive findings and that Mr. Chavez was not disabled. His opinion was supported by the MRI findings although compromised by movement, as read as negative". App. 56a.

The ALJ stated that "[i]t was obvious that Doctor Nehmer and Dr. Koval presented compelling and well reasoned evidence, specifically their range of motion studies, that Mr. Chavez[']s disability relative to the accident of March 11, 1996 ended April 1, 1996." App. 64a. The ALJ discounted

the objective medical findings of treating physicians, Dr. Munoz and Dr. Bradley, and the consultative examination of Dr. Tevlin and Dr. Myers.

As to permanent partial disability, the ALJ stated "the Act does not make a provision for a 'whole person' impairment rating pursuant to a schedule." App. 57a. The ALJ ruled the employer liable for only 2 visits to Dr. Bradley and the May 16, 1996 MRI. The ALJ found that petitioner engaged in symptom magnification. Petitioner continued his treatment with Dr. Bradley through February 1997.

The administrative law judge (ALJ) ruled on July 14, 1998 that petitioner was entitled to continued medical and temporary total disability payments from March 11 (later corrected to March 14) through May 22, 1996. The respondents appealed and petitioner cross-appealed. The Benefits Review Board (BRB) on August 17, 1999, vacated the denial of additional temporary total disability and medical benefits and remanded the matter back to the same ALJ.

In its decision, the BRB found that Dr. Koval's report does not support ending disability benefits on May 22, 1996 since he did not examine claimant until July 8, 1996 after claimant returned to work. The BRB noted that Dr. Koval "does not state that claimant was never disabled by his work injury". The BRB pointed out that the ALJ did not address Dr. Bradley's opinion that claimant required physical therapy and should not return to work until June 17, 1996. App. 29a-30a.

Citing *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988), the Benefits Review Board explained that the

"Act does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related." Moreover, the BRB reiterated pursuant to law that "a claimant's ability to return to work is not determinative of his entitlement to medical benefits if he remained in need of treatment for his work injury." *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). App. 32a. The BRB did not address petitioner's permanent partial disability issue pursuant to Sec. 908.

On remand to the same ALJ, on January 7, 2000, using basically the same findings of facts and conclusions of law as previously, the ALJ affirmed in total his own previous determination to cut off disability benefits and medical benefits during treatment on May 22, 1996. Petitioner filed an appeal which was denied by the BRB on February 2, 2001. Petitioner appealed to the Third Circuit Court of Appeals which on November 17, 2001 denied the Petition for Review of the Benefits Review Board. In its opinion the Third Circuit did not address the permanent partial disability issue. On February 12, 2002 a rehearing en banc was denied. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted to insure that workers protected under the Act are not deprived of necessary medical treatment and the various disability compensation to which they are entitled. The purpose of Congress in enacting this Act is to help those injured employees and ease their physical, emotional and financial pain.

It is quite evident from reading the cases involving the Act that there are conflicting interpretations of this Act throughout the administrative track and the circuit courts. This Court's guidance is also necessary to insure that administrative law judges are equipped to handle the difficult interpretation of this Act as to, for example, permanent partial disability and payment of medical expenses, since appellate panels are instructed to defer to the administrative law judges.

This petition should be granted because the issue of continued treatment after an employer has cut off medical benefits is crucial. Many employees with little resources and unsure of later success in the courts abandon further treatment to their detriment or else are left with mounting medical bills.

Another reason for granting this petition is for the Court to consider the possible due process violations inherent in a system where the review boards remand to the same judge.

I. Whether When A Ruling By The Administrative Law Judge That An Injured Employee Is Fully Recovered Is Based On An Employer-Sponsored Examination, The Employee Has Been Refused Treatment By The Employer And Is Entitled To Reimbursement Of Reasonable Medical Expenses Incurred For Continued Treatment With Employee's Physician Authorized By The Employer Pursuant To Sec. 907 Under The Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.A. § 901 *et seq.*

In *Shahady v. Atlas Tile & Marble, Inc. v. Lloyd*, 233 U.S. App. D.C. 253, 725 F.2d 780 (D.C. Cir. 1984), the DC Circuit reinforced the holding of the Fifth Circuit that "[w]hen an employee is told by the employer's physician

that 'he is recovered from his injury and requires no further treatment, he has, in effect, been refused treatment by the employer and is therefore entitled to reimbursement for all necessary treatment subsequently procured on his own initiative'". *Atlantic & Gulf & Gulf Stevedores Inc. v. Newman*, 440 F.2d 908, 911 (CA5 1971). In *Roger's Terminal and Shipping Corp. v. Director*, 784 F.2d 687 (CA5 1986), the Fifth Circuit followed its reasoning in *Atlantic*.

The fact that a judge relies heavily on an employer-sponsored examination to deny medical payments is comparable to an employer's physician who has stopped treatment. In *Sir Gean Amos v. Director*, 164 F.3d 480 (CA9 1999), the Ninth Circuit stressed that "[w]here an injured employee seeks benefits under the LHWCA, a treating physician's opinion is entitled to special weight." The Court went on to reiterate the Supreme Court's position "[w]e afford greater weight to a treating physician's opinion because he is employed to cure and has a greater opportunity to know and observe the patient as an individual". *Maggalanes v. Bowen*, 881 F.2d 747, 751(CA9 1989) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 107, 229 (1938). The *Amos* Court in contrast to the Third Circuit stood for the proposition that "[a]lthough the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny".

II. Pursuant To The Longshoremen's And Harbor Workers' Compensation Act, Under Permanent Partial Disability Relating To Loss Of Use Of A Body Part, What Factors Determine Whether Benefits Are Calculated Under 908(c)(19) or (c)21?

The Third Circuit did not address the issue presented on permanent partial disability. The ALJ stated in his opinion that the Act did not allow for a "whole person" impairment rating pursuant to a schedule. In *Pool v. Director, Office of Workers' Compensation Programs*, 206 F.3d 543 (CA5 2000), the Fifth Circuit concluded that injuries to a scheduled body part resulting from injuries on an unscheduled part fall under 908(c)(21). In a Fourth Circuit unpublished opinion, mention is made of the ALJ's recognition "that evidence of physical harm was relevant to determination of the location".

III. Whether It Is A Violation Of Due Process For Review Boards In The Federal System To Remand a Case To The Same Administrative Judge. Is There A Presumption Of Vindictiveness or Loss Of Objectivity On The Part Of The Reversed Judge?

In *United States v. Resendez-Mendez*, 251 F.3d 514 (CA5 2001), the court noted a presumption of vindictiveness when, on remand to the same judge, the judge imposed a harsher sentence then originally. The practice of remanding to the same judge should be reviewed. Appellants' attorneys as advocates for their clients on appeal must point out the errors of the judge below. Thus, the objectivity of the remanded judge may be impacted. The same judge should not be allowed to reweigh the evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED NOVEMBER 19, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-1540

RHADAMES CHAVEZ,

Petitioner

v.

UNIVERSAL MARITIME SERVICE CORPORATION; SIGNAL MUTUAL INDEMNITY ASSOCIATION; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OF AMERICA

On Appeal from Decision of the U.S. Department of Labor Benefits Review Board (BRB No. 00-0504)

Submitted Under Third Circuit LAR 34.1(a) November 8, 2001

Before: McKEE, RENDELL and STAPLETON, *Circuit Judges*

(Filed: November 19, 2001)

MEMORANDUM OPINION

Appendix A

RENDELL, *Circuit Judge.*

Rhadames Chavez was working as a hatch checker for Universal Maritime Service Corporation on March 11, 1996, when he was struck on the neck and shoulder by a piece of ice that had fallen from an overhead crane. Chavez reported his injuries and sought medical treatment three days later, and returned to work on June 16, 1996. After a dispute arose regarding the amount of disability and medical expenses Universal should pay, Chavez filed a claim for disability compensation pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.

The administrative law judge ("ALJ") who heard the dispute issued his first Decision and Order on July 14, 1998. The ALJ weighed the various and sometimes contradictory opinions of the many physicians who had examined Chavez. Based on his findings, he ordered Universal to pay Chavez's medical expenses and temporary total disability from March 14, 1996, through May 22, 1996. Arguing that the proper end date was April 2, not May 22, 1996, Universal appealed to the U.S. Department of Labor, Benefits Review Board ("BRB"), and Chavez cross-appealed, claiming that the end date should actually be extended and that he should have also been awarded partial disability benefits. The BRB vacated the ALJ's denial of temporary total disability and medical benefits after May 22, 1996, and remanded the case for further review by the ALJ, but refused to remand for reconsideration the ALJ's denial of partial disability benefits.

On remand, the ALJ clarified the reasoning in his initial opinion and reconfirmed his finding that Chavez's disability

ended before May 22, 1996, when the diagnostic testing was complete. Chavez then appealed to the BRB again arguing that the end date should be later than May 22, 1996 and that he should be awarded partial disability benefits. On appeal, the BRB affirmed the ALJ's new Decision and Order and denied Chavez's challenge to the ALJ's denial of partial disability benefits, as well as the denial of temporary total disability and medical benefits after May 22, 1996. Chavez now appeals the Decision and Order of the BRB. We will affirm.

We exercise jurisdiction to review final orders of the Benefits Review Board pursuant to 33 U.S.C. § 921(c). We must review the BRB's determination that the ALJ's decision was based on substantial evidence. *Walker v. Universal Terminal & Stevedoring Corp.*, 645 F.2d 170, 172 (3d Cir. 1981); *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 236 (3d Cir. 1979). As we have previously explained, "[I]n order to determine whether the Board has properly adhered to its scope of review, the court of appeals must make an independent review of the record and decide whether the ALJ's findings are supported by substantial evidence." *Id.* "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313 (3d Cir. 1995) (quoting *Kowalchick v. Dir. Office of Worker's Comp. Programs*, 893 F.2d 615, 620 (3d Cir. 1990)).

We agree with the BRB that the ALJ's factual and legal determinations were supported by substantial evidence. In its decision, the BRB correctly stated that the role of the ALJ is "to weigh the evidence and evaluate the credibility of all the witnesses, including doctors, and [to] draw his own

conclusions from the evidence." The ALJ hears the arguments of each side and the testimony of witnesses and is in the proper position to determine the weight to be accorded to each.

In this case, Chavez was examined by more than six different doctors during the course of his treatment and this dispute. The doctors who became the focus of the ALJ's determinations were: Dr. Douglas Bradley, a physician who treated Chavez beginning May 14, 1996; Dr. Steven Nehmer, Universal's medical expert; Dr. Raymond Koval, an impartial examiner appointed by the U.S. Department of Labor; and Drs. William Tevlin and David Myers, physicians consulted by Chavez for the purpose of this action. While the ALJ found that Drs. Nehmer and Koval "presented compelling and well reasoned evidence," he found that the report of Drs. Tevlin and Myers was not well-reasoned or accurate. He also found that Dr. Bradley's conclusions were tainted by the incorrect information provided by Chavez, as Dr. Tevlin had convincingly testified that Chavez was engaging in symptom magnification. This series of determinations was the basis for the ALJ's conclusions.

After much deliberation, the ALJ concluded that May 22, 1996, was the proper date at which to end Universal's payment of temporary total disability and medical expenses, and rejected Chavez's claim for partial disability. We find that the ALJ's ruling was based upon substantial evidence which consisted primarily of expert reports, but also included statements of lay persons. Upon complete review of the record, we conclude that the evidence on which he relied was a reasonable basis for his decision.

Appendix A

For the foregoing reasons we will deny the Petition for Review of the Decision and Order of the Benefits Review Board.

TO THE CLERK OF COURT:

Please file the foregoing memorandum opinion.

s/ [illegible]
Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1540

RHADAMES CHAVEZ,

Petitioner

v.

UNIVERSAL MARITIME SERVICE CORPORATION;
SIGNAL MUTUAL INDEMNITY ASSOCIATION;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES OF AMERICA

On Appeal from Decision of the U.S. Department of Labor
Benefits Review Board
(BRB No. 00-0504)

Submitted Under Third Circuit LAR 34.1(a)
November 8, 2001

Before: McKEE, RENDELL and STAPLETON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States Department of Labor, Benefits Review Board and was submitted pursuant to Third Circuit LAR 34.1(a) on November 8, 2001: On consideration whereof, it is now here

Appendix A

ORDERED and ADJUDGED by this Court that the Petition for Review of the Benefits Review Board Decision and Order entered on February 2, 2001, is hereby DENIED. All of the above in accordance with the opinion of this Court. Costs taxed against the petitioner.

ATTEST:

s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: 19 November 2001

APPENDIX B — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR DATED FEBRUARY 2, 2001

U.S. DEPARTMENT OF LABOR

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 00-0504

DATE ISSUED: FEB 2, 2001

RHADAMES CHAVEZ

Claimant-Petitioner

v.

UNIVERSAL MARITIME SERVICE CORPORATION

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION

Employer/Carrier-Respondents Cross-Respondents

DECISION AND ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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* * *

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1784) of Administrative Law Judge Paul H. Teitler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. Claimant sustained work-related injuries to his neck and right shoulder on March 11, 1996. Employer voluntarily paid claimant temporary total disability benefits from March 14, 1996, to April 1, 1996, and medical benefits. In his initial decision, the administrative law judge awarded claimant temporary total disability benefits from March 14, 1996, to May 22, 1996, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, until May 22, 1996.

On appeal, employer challenged the administrative law judge's award of temporary total disability benefits through May 22, 1996, and claimant, on cross-appeal, challenged the administrative law judge's denial of compensation and medical benefits after May 22, 1996.

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In its decision, the Board vacated the administrative law judge's determinations that claimant's entitlement to temporary total disability benefits ceased on May 22, 1996, and that claimant is not entitled to medical benefits after May 22, 1996, and remanded the case for further consideration of those issues. *See Chavez v. Universal Maritime Service Corp.*, BRB Nos. 98-1555/A (Aug. 17, 1999)(unpub.). In addition, the Board affirmed the administrative law judge's denial of partial disability benefits. *Id.* On remand, the administrative law judge awarded both temporary total disability and medical benefits from March 11, 1996, until May 22, 1996.

On appeal, claimant again challenges the administrative law judge's denial of partial disability benefits, as well as the denial of temporary total disability and medical benefits after May 22, 1996. Employer responds, urging affirmance.

At the outset, we reject claimant's contention that he is entitled to an award of partial disability benefits in this case, as this issue was fully considered and resolved by the Board in its prior decision. *Chavez*, slip op. at 3-4. Specifically, the Board affirmed the administrative law judge's finding that claimant is not entitled to partial disability benefits as he did not establish that the loss of his usual work was due to the work injury. *Id.* Thus, as this issue has already been decided by the Board, and that decision constitutes the law of the case, we decline to address claimant's contentions regarding his entitlement to partial disability benefits. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

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Claimant next contends that the administrative law judge erred in terminating his entitlement to temporary total disability benefits on May 22, 1996, asserting that his award of benefits should extend to June 16, 1996, the date that his treating physician, Dr. Bradley, determined that he could return to work.

In order to demonstrate a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual work due to his work injury. *See Harmon v. Sea-Land Service*, 31 BRBS 45 (1997). It is well-established that an administrative law judge is entitled to weigh the evidence and evaluate the credibility of all witnesses, including doctors, and may draw his own conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (.1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the Board may not re-weigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

On remand, the administrative law judge accorded greatest weight to the April and June 1996 medical reports of Dr. Nehmer stating that as of April 3, 1996, claimant was capable of returning to his usual work and to the negative MRI evidence, which the Board previously agreed supported a determination that claimant's disability ended on May 22, 1996. *Chavez*, slip op. at 3. In contrast, the administrative law judge gave less weight to the opinion of Dr. Bradley that

claimant could not return to work until June 17, 1996, since it was based on the medical history and complaints provided by claimant, which the administrative law judge determined were not credible based on Dr. Nehmer's assessment that claimant was engaging in symptom magnification. As the administrative law judge's weighing of the medical evidence is within his discretion and as Dr. Nehmer determined that claimant was capable of returning to his regular work as of April 3, 1996, we affirm the administrative law judge's finding that claimant is not entitled to additional temporary total disability benefits beyond May 22, 1996, as it is rational, supported by substantial evidence, and in accordance with law. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Claimant also contends that the administrative law judge erroneously concluded that claimant is entitled to medical benefits only through May 22, 1996, as the evidence of record establishes that a rehabilitation program beyond that date was authorized and would be beneficial to claimant's condition. Specifically, claimant avers that since the examination by Dr. Bradley on May 14, 1996, and subsequent recommendation for physical therapy on May 21, 1996, are within the period during which medical benefits were awarded, he is entitled to medical benefits for that physical therapy, particularly since both Drs. Bradley and Nehmer acknowledge the beneficial nature of the physical therapy in examinations conducted after May 22, 1996.[1] Claimant also

1. Contrary to claimant's assertion, Dr. Nehmer has made no comment regarding the beneficial nature of the physical therapy which (Cont'd)

argues that the administrative law judge did not follow the Board's reasoning and instructions in terminating claimant's entitlement to medical benefits after May 22, 1996. In order for a medical expense to be assessed against employer, it must be both reasonable and necessary for the treatment of claimant's work-related injury. *See* 33 U.S.C. §907; *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989).

In its prior decision, the Board observed that the administrative law judge determined that employer was responsible for the payment of medical benefits until claimant's medical condition had been fully investigated by Dr. Bradley, and claimant was capable of returning to work. The Board, however, vacated the administrative law judge's finding that claimant is not entitled to medical benefits after May 22, 1996, since the administrative law judge did not address Dr. Bradley's recommendation that claimant undergo physical therapy after that date, and his continued treatment of claimant thereafter. In addition, the Board noted that a claimant's ability to return to work is not determinative of his entitlement to medical benefits if he remains in need of treatment for his work injury. *Chavez*, slip op. at 4, *citing Cotton v. Newport News Shipbuilding & Dry Dock* Co., 23 BRBS 380 (1990).

On remand, the administrative law judge determined that claimant's testimony, relative to his need for further

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(Cont'd)
claimant was receiving up to the time of his June 5, 1996, medical report. Rather, in that report, Dr. Nehmer merely acknowledged that "claimant is getting physical therapy, and feels that he has made some improvement." Employer's Exhibit (EX) 6.

treatment, was not credible in light of the negative MRI and the reports of Dr. Nehmer's two physical examinations. The administrative law judge thus found that Dr. Bradley's recommendation for further physical therapy, based in large part on claimant's subjective complaints, was not necessary. In this regard, the administrative law judge followed the Board's instructions on remand to address Dr. Bradley's recommendation of physical therapy and continued treatment of claimant.

In addition, the administrative law judge concluded that claimant's disability ended prior to May 22, 1996, on April 3, 1996, but that he allowed time for the negative MRI to rule out any and all disability. He therefore concluded that employer was responsible for medical benefits until May 22, 1996.[2] In so finding, the administrative law judge again relied upon the "well-reasoned" medical opinion of Dr. Nehmer, based on his examinations of claimant on April 3, 1996, and June 5, 1996. In his April 3, 1996, medical report, Dr. Nehmer opined that claimant was capable of returning to his usual work, and was not in need of any further testing or treatment. EX 3. On June 5, 1996, Dr. Nehmer reiterated this opinion. EX 6. The administrative law judge decision to credit Dr. Nehmer's opinion that claimant did not need any further treatment after April 3, 1996, over the contrary opinion of Dr. Bradley is rational, supported by substantial evidence, and in accordance with law. Accordingly, we affirm the administrative law judge's denial of medical benefits after May 22, 1996. *See generally Brooks v. Newport News*

2. The administrative law judge found that the award of medical benefits up to May 22, 1996, was "precautionary" in nature. Decision and Order dated January 7, 2000, at 4.

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Shipbuilding & Dry Dock Co., 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993).

Claimant lastly requests that the Board issue an order stating that claimant is entitled to an attorney's fee to be assessed against employer based upon his successful appeal. Contrary to claimant's contention, his appeal has not been successful as he has not received any additional benefits as a result of the Board's remand, or as a result of the administrative law judge's decision on remand. The Board's present affirmance of the administrative law judge's decision on remand merely reinstates the administrative law judge's original award of benefits in this case. Claimant, however, may be entitled to an attorney's fee assessed against employer for work performed before the Board in successfully defending against employer's initial appeal of the administrative law judge's award of temporary total disability benefits through May 22, 1996. *See Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988). In order to be entitled to an award of an attorney's fee, counsel must submit a fee petition which conforms to the requirements of 20 C.F.R. §802.203. *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX C — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR DATED JANUARY 7, 2000

U.S. Department of Labor

Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, NJ 08104

(856) 757-5312
(856) 757-5403 (FAX)

CASE NO.: 1997-LHC-01784

OWCP NO: 02-118408

In the Matter of

RHADAMES CHAVEZ,

Claimant

v.

UNIVERSAL MARITIME SERVICES CORP.

Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION

Carrier

Appendix C

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Rhadames Chavez, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act). A formal hearing was held in New York, N.Y. on January 13, 1998, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations. On July 14, 1998, a Decision and Order was issued by the undersigned Ordering that:

1. Claimant is entitled to compensation based upon his average weekly wage for total temporary disability from March 11, 1996 to May 22, 1996. The actual amount shall be determined by the District Director. The parties assert that the average weekly wage is $1,459.97, leading to a compensation rate of $782.44.

2. Claimant is entitled to payment of all medical expenses pursuant to §7 until May 22, 1996.

The Employer appealed the above Decision and Order, and the Claimant cross-appealed. On August 17, 1999 the Benefits Review Board, the "Board" issued a "Not-Published"

Decision and Order. In their Order the Board credited my finding that Mr. Chavez was capable of performing his usual work as a hatch checker and that his removal from this position was not related to his work injury, Decision and Order at 15-17. The Board vacated the denial of additional temporary total disability and medical benefits after May 22, 1996 and Remanded this case to the undersigned for further consideration consistent with their opinion.

In their opinion, the Board stated that the negative MRI evidence, combined with Dr. Nehmer's earlier opinion supports my determination that Claimant's disability ended on May 22, 1996, Dr. Koval's opinion does not support the termination of benefits at this date. He did not examine Claimant until July 8, 1996 after Claimant had returned to work. The Board stated:

> Although the administrative law judge found it reasonable to award Claimant benefits until he was examined by Dr. Bradley, he does not address Dr. Bradley's opinion that Claimant could not return to work until June 17, 1996.

The Board vacated my determination that Mr. Chavez's entitlement to temporary total disability benefits ceased on May 22, 1996.

Statement of the case

Claimant was employed by Employer Universal Maritime Corp., prior to the accident of March 11, 1996. On that date he was working as a "Hatch Checker" of the vessel. He went

to the crane form to speak to the crane operator since his radio was not working properly. He was hit by a "big chunk of Ice" on the back of his neck and shoulder. Mr. Chavez claimed that It was a heavy impact and he sort of blanked out for a moment. He was out of work from March 14, 1996, when he started treatment with Dr. Munoz. Mr. Chavez returned to work on June 16, 1996 and has been working since.

At the outset, I agree with Employer that the issues are: First, whether substantial evidence supports either an earlier or later date for termination of temporary disability benefits? Second, whether substantial evidence supports an award of medical benefits and/or other benefits after May 22, 1996. The issue of a permanent disability was rejected both in my Decision and Order and on appeal by the "Board".

The Board agreed that the negative MRI evidence combined with Dr. Nehmer's earlier opinion supports the determination that Claimant's disability ended on May 22, 1996. However the "Board" stated that Dr. Koval's opinion does not support the termination of benefits at this date. He did not examine Claimant until July 8, 1996 after Claimant had returned to work. He found no work related injury at that time, but did not state that claimant was never disabled by his work injury. Moreover although the undersigned found it reasonable to award Claimant benefits until he was examined by Dr. Bradley. The "Board" also stated that the undersigned did not address Dr. Bradley's opinion that Claimant could not return to work until after June 17, 1996.

In my previous Decision and Order, I found:

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> Mr. Chavez's testimony was not creditable relative to the extent of his injury. He did not receive treatment immediately after the accident. The first day he was out of work was March 14, 1996. He worked two days after and returned to full time in July, 1996.

In my previous Decision I also found that:

> Dr. Nehmer creditably testified that his medical opinion was that Mr. Chavez was engaging in symptom magnification, based upon his two examinations. Dr. Koval found a full range of motion of the cervical spine with tenderness to the right neck-shoulder junction. There was a full range of motion but the extremes caused discomfort, there was no motor or sensory disturbances, no abnormal reflexes, negative Tinel's compression and Phalen's tests. The objective testing by both Doctors lead to the conclusion that Mr. Chavez was not creditable in discussion his alleged pain and symptoms above. Mr. Chavez's testimony relative to his continuing injury was not creditable, and I so found.

In assessing Dr. Bradley's opinion we must note that the medical history and complaints were given by Mr. Chavez who I found not to be creditable. Dr. Nehmer creditably testified that his medical opinion was that Mr. Chavez was engaging in symptom magnification, based upon his two examinations.

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Mr. Chavez testified that he went to see Dr. Bradley, TX 19-21. He told the doctor that he could not grasp from the floor, stretch his right arm, clean himself. The doctor told him to have an MRI to see what was happening. Dr. Bradley sent him for physical therapy which was painful at first, and eventually it helped him. He returned to work after Dr. Bradley treated him. TX 21-24

In my Decision and Order I specifically found it reasonable to award benefits until Mr. Chavez was examined by Dr. Bradley. Claimant's counsel argues that since Dr. Bradley was authorized to treat the Claimant and his prescription for physical therapy was conducted after May 22, 1996 it is inconsistent that I not extend the temporary total disability until Mr. Chavez returned to work in June 16, 1996. The Board credited this argument remanded the case to address this alleged inconsistency. The Employer argues that both the two medical examinations of Dr. Nehmer and the examination of Dr. Koval, the impartial examiner, indicate that Mr. Chavez did not have any impairment that would prevent his return to work May 22, 1996. Dr. Koval examined on July 8, 1996 after Mr. Chavez returned to work. Dr. Koval opined that the Claimant had reached maximum medical improvement required no further treatment, manifested no signs of permanent impairment and could return and did return to employment. The Employer argues that it is obvious that Mr. Chavez did not want to return to work until he had exhausted all possibilities of obtaining an award for permanent injuries.

In my Decision and Order, I summarized the testimony of Mr. Chavez relative to his history given to Dr. Bradley.

He asked his boss if he could see a specialist, and went to see Dr. Bradley, TX 19-21. He told the doctor that he could not grasp from the floor, stretch his right arm, clean himself. The doctor told him to have an MRI to see what was happening. Dr. Bradley sent him for physical therapy which was painful at first, and eventually it helped him. He returned to work after Dr. Bradley treated him. TX 21-24. He said that he has problems at work using a pencil for a long period of time, which causes him to have feelings and he has to stop. He testified that he felt that the therapy helped him out but the pain does not go away. Sudden movements of his neck causes pain that is like a jab in the back, which doesn't happen all the time, TX 25. He still gets cramps, numbness of the fingers in the right hand if he hold something too long, or writes a letter to his sister, TX 26. He said that he tried to use a machete to cut bushes but it kept falling out of his hands. TX 26, 27. He is fifty three years old.

I found that his testimony not creditable relative to his need for further treatment, after May 22, 1996. His statements to Doctor Bradley that he could not clean himself, was not creditable. His statement that he tried to use a machete to cut bushes, but it kept falling out of his hands was also not creditable. Dr. Nehmer's creditably stated that he was magnifying symptoms, and that there was an absence of objective indicia of injury. The Claimant was entitled to an objective test, the MRI, which was reported as negative.

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I agree with Respondent-Employer's position, That the award of medical benefits up to May 22, 1996 was "precautionary, in nature, i.e., that it was designed to offer Claimant the benefit of every doubt. Accordingly when all the diagnostic testing was complete — and all the tests were negative", Certainly the bizarre complaints that he made would cause a prudent physician to order more treatment. However I found his complaints not creditable in consideration of the MR1 and Dr. Nehmer's two physical examinations. I deemed that further care was unnecessary. At that point I had explored all the subjective complaints, determined that they, as well as Mr. Chavez's testimony were not creditable. I concluded based upon the well reasoned opinion of Dr. Nehmer, the MRI, and the later opinion of Dr. Koval that the Mr. Chavez's alleged disability had ended prior to May 22, 1996, when the diagnostic testing was complete. Certainly the Respondent had put forth substantial evidence that Mr. Chavez's disability ended in April 1, 1996. However I allowed the MRI to rule out any and all disability and concluded that the Employer was responsible until May 22, 1996. To extend treatment further, would be an unjustifiable expense to the Employer. I specifically find that Mr. Chavez's disability ended before May 22, 1996, *supra*.

After review of the Board's remand and upon my review of the previous findings of fact, conclusions of law and the entire record, I again issue the following Order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

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IT IS AGAIN ORDERED THAT:

1. Claimant is entitled to compensation based upon his average weekly wage for total temporary disability from March 11, 1996 to May 22, 1996. The actual amount shall be determined by the District Director. The parties assert that the average weekly wage is $1,459.97, leading to a compensation rate of $782.44.

2. Claimant is entitled to payment of all medical expenses pursuant to §7 until May 22, 1996.

s/ Paul H. Teitler
PAUL H. TEITLER
Administrative Law Judge

Dated: JAN 7, 2000
Camden, New Jersey

APPENDIX D — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR DATED AUGUST 17, 1999

U.S. DEPARTMENT OF LABOR

Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

BRB Nos. 98-1555
and 98-1555A

DATE ISSUED: AUG 17 1999

RHADAMES CHAVEZ

Claimant-Respondent
Cross-Petitioner

v.

UNIVERSAL MARITIME SERVICE CORPORATION

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION

Employer/Carrier-
Petitioners
Cross-Respondents

Appendix D

DECISION and ORDER

Appeal of the Decision and Order and the Order Granting Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

* * *

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order and the Order Granting Motion for Reconsideration (97-LHC-1784) of Administrative Law Judge Paul H. Teitler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b3).

Claimant, a hatch checker, injured his neck and right shoulder at work on March 11, 1996, when a big chunk of ice fell from a crane and landed on him. Employer voluntarily paid claimant temporary total disability benefits from March 14, 1996, to April 1,1996, and medical benefits. The administrative law judge awarded claimant temporary

total disability benefits from March 14, 1996, to May 22, 1996, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. § 907, until May 22, 1996.

On appeal, employer challenges the administrative law judge's award of temporary total disability benefits until May 22, 1996. Claimant cross-appeals the administrative law judge's denial of compensation and medical benefits after May 22, 1996. Both claimant and employer have filed response briefs.

We first address the challenges by both employer and claimant to the administrative law judge's award of temporary total disability benefits. Employer contends that the administrative law judge irrationally awarded claimant temporary total disability benefits until May 22, 1996, after finding Dr. Nehmer's opinion returning claimant to work on April 1, 1996, compelling and well reasoned. Claimant contends that the administrative law judge erred in terminating the temporary total disability benefits on May 22, 1996, after finding that employer was liable for benefits until claimant's condition had been fully investigated by Dr. Bradley, given that Dr. Bradley did not release claimant to return to his usual work until June 17, 1996. To establish his *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In determining that claimant was entitled to temporary total disability benefits until May 22,1996, the administrative law judge stated that Dr. Nehmer and Dr. Koval "presented

compelling and well reasoned evidence" in the form of their range of motion findings, that claimant was able to return to his usual work by April 1, 1996. Decision and Order at 17. Dr. Nehmer deposed that claimant was able to return to his usual work as of April 1, 1996, and that claimant was not in need of additional treatment. Dr. Koval first examined claimant on July 8, 1996, on behalf of the Department of Labor, and found tenderness in the shoulder area, but a full range of motion. He stated that claimant had no work-related injury, and noted that claimant had returned to work and should continue to do so. The administrative law judge noted that claimant was authorized to see Dr. Bradley, and the administrative law judge concluded, in light of the aforementioned evidence, that it was reasonable for employer to pay disability benefits until Dr. Bradley had fully investigated claimant's complaints. Magnetic resonance imaging of claimant's shoulder and cervical spine did not reveal any significant problems. Dr. Bradley stated claimant could return to work on June 17, 1996. Decision and Order at 17; Cl. Exs. E-F.

We agree with the parties' contentions that this case must be remanded to the administrative law judge for further findings, as his conclusion is not consistent with the evidence he credited. Although the negative MRI evidence, combined with Dr. Nehmer's earlier opinion supports the administrative law judge's determination that claimant's disability ended on May 22, 1996, Dr. Koval's opinion does not support the termination of benefits at this date. He did not examine claimant until July 8, 1996, after claimant had returned to work. He found no work-related injury at that time, but does not state that claimant was never disabled by his work injury.

Moreover, although the administrative law judge found it reasonable to award claimant benefits until he was examined by Dr. Bradley, he does not address Dr. Bradley's opinion that claimant could not return to work until June 17, 1996. Consequently, we vacate the administrative law judge's determination that claimant's entitlement to temporary total disability benefits ceased on May 22, 1996, and we remand this case to the administrative law judge for further consideration of the date claimant was able to return to work.

We next address claimant's contention that the administrative law judge erred in not awarding him partial disability benefits. Claimant contends his injury impeded his ability to perform his work, which in turn caused his transfer to another position. The administrative law judge did not explicitly determine whether claimant established his entitlement to partial disability benefits. Remand is not required, however, as the evidence which the administrative law judge credited establishes that claimant was capable of performing his usual work as a hatch checker, and that his removal from this position was not related to his work injury. Decision and Order at 15-17.

Post-injury, claimant worked as a hatch checker from June 1996 through November 1996. Tr. at 40. In his deposition, Stanley Lysick, employer's safety manager, explained that claimant was reassigned from his usual work as a hatch checker to a clerk position based on his poor performance pre-dating the injury. Emp. Ex. 12 at 28-29; *see also* Emp. Ex. 10. Mr. Lysick testified that claimant's reassignment resulted in a loss in hours, and thus a loss in income. Emp. Ex. 12 at 44-45. Mr. Lysick further testified

that in claimant's union grievance, claimant took the position that he had the physical capacity to perform his job as a hatch checker. Emp. Ex. 12 at 30-31. Although claimant testified that he continued to have physical problems stemming from the work injury, claimant's testimony is the only evidence of his inability to perform his usual work and the administrative law judge found his testimony not credible in view of the medical evidence of record.[1] *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Decision and Order at 15-16; Tr. at 24-25, 32, 55. As claimant did not establish that the loss of his usual work was due to the work injury, he is not entitled to partial disability benefits.

Lastly, we address claimant's contention that the administrative law judge erred in failing to award him medical benefits after May 22, 1996, noting that Dr. Bradley, on May 21, 1996, recommended physical therapy, and continued to see claimant on several occasions. The Act does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary for the treatment of claimant's work-related injury. 33 U.S.C. § 907; *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989).

In determining that claimant was entitled to medical benefits only until May 22, 1996, the administrative law judge

1. As noted, Drs. Nehmer and Bradley returned claimant to his usual work.

found employer responsible for the payment of medical benefits until claimant's medical condition had been fully investigated by Dr. Bradley, and he was capable of returning to work. Decision and Order at 17. Claimant's ability to return to work is not determinative of his entitlement to medical benefits if he remained in need of treatment for his work injury. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Moreover, although finding Dr. Bradley's assessment of claimant's condition necessary, the administrative law judge did not address Dr. Bradley's recommendation that claimant undergo physical therapy and his judgment that such therapy was beneficial to claimant, or his subsequent treatment of claimant. We, therefore vacate the administrative law judge's denial of all medical benefits after May 22, 1996, and we remand the case for further consideration of claimant's entitlement to additional medical benefits.

Accordingly, the administrative law judge's denial of additional temporary total disability and medical benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

Appendix D

s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX E — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR DATED JULY 14, 1988

U.S. Department of Labor

Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, NJ 08104

CASE NO.: 97-LHC-01784

OWCP NO.: 2-118408

In the Matter of

RHADAMES CHAVEZ

Claimant

v.

UNIVERSAL MARITIME SERVICES CORP.

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

* * *

Appendix E

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by, Rhadames Chavez, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-950 (the Act).

A formal hearing was held in New York, N.Y. on January 13, 1998, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

At the hearing, the following stipulations were entered into the record:

1. The Act (33 U.S.C. §§ 901-950) applies to this claim.

2. Claimant and Employer were in an employer-employee relationship at the time of the accident/ injury.

3. The accident/injury arose out of, and in the scope of, employment.

4. The date of the accident/injury was March 11, 1996.

5. It is agreed that Claimant filed a timely notice of claim.

6. Claimant was paid total temporary disability from March 14, 1996 to April 1, 1996. Medical benefits were paid under §7 of the Act.

7. Claimant's average weekly wage was $1459.97

8. Claimant's compensation rate is $782.44.

ISSUES

Per the joint stipulation of the parties (JX 1), the following issues were presented for resolution:

1. The nature and extent of Claimant's disability; Mr. Chavez was paid temporary total benefits from March 14, 1996, through April 1, 1996.

2. Is Mr. Chavez entitled to continuation of disability benefits after April 1, 1996?

3. Is Mr. Chavez entitled to payment of outstanding medical bills as set forth Claimant's Exhibit 6?

Appendix E

STATEMENT OF THE CASE

Claimant was employed by Employer Universal Maritime Corp., prior to the accident of March 11, 1996. On that date he was working as a "Hatch Checker" on a vessel. A hatch checker stands or sits in a booth most of the time, checking containers that are being loaded and unloaded on a vessel. A hustler pulls up to the hatch checker booth with a container or is waiting to receive one. A number located on the container is checked for accuracy, if visible from the booth, or stepping out of the booth to see it. A hatch checker has to wait for the crane to come down and load the container on to the ship. Sometimes he had to drive a vehicle to make sure he was sending the right container to a ship. There is no lifting required in his job description. TX 43,44. On March 11, Mr. Chavez went to the crane form to speak to the crane operator since his radio was not working properly and was hit by a "big chunk of ice", that fell from the crane, on the back of his neck and shoulder. Mr. Chavez claimed that it was a heavy impact and he sort of blanked out for a moment. He was out of work from March 14, 1996, when he started treatment with Dr. Munoz. Mr. Chavez returned to work on June 16, 1996 and has been working since.

Testimony of Rhadames Chavez

Mr. Chavez testified that after the accident, he felt pain in the back of the neck, shoulders and pain through his arms. If something fell on the floor and he tried to grab it with his right arm, he claimed that he screamed because of the pain shooting through his arms. He said that he continued to work since, for the day of the accident and the other day because

he had a responsibility there. He testified that he had notified his supervisor of his pain and continued to work. He said after the accident he had difficulty sleeping and he had pain which he thought would go away. Mr. Chavez testified that it was not his intention to apply for anything but the fact that his injury wouldn't let him work forced him to seek medical attention. He was told to go to the medical clinic in Elizabeth and he saw Dr. Munoz. He told the Doctor what happened and that claimed that the back of his neck and shoulder were swelled up and ached from pain. He told the Doctor that he could not sleep due to headaches and pain in the shoulders. He also told the doctor that sometimes he sits at the table and tries to grab a fork which caused him to get cramps and numbness in his right hand. He testified that Dr. Munoz gave him treatments with a hot pad, medicine for the pain, and physical therapy for his right hand, back of his neck and shoulder. TX 15,16,17,18. He stated that he gets "funny feelings" in his fingers that become cramps which render him unable to write or grasp anything from the floor. He testified that the pain became so severe that he cried. He had to rub his right hand because his fingers became numb. TX 18,19. At work, he had trouble twisting his neck when he was looking for containers and he had cramps in his hands when writing with a pencil. He asked his boss if he could see a specialist, and went to see Dr. Bradley, TX 19-21. He told Dr. Bradley that he could not grasp from the floor, stretch his right arm, or clean himself. The doctor told him to have an MRI to determine what was happening. Mr. Chavez testified that Dr. Bradley sent him for physical therapy which was painful at first, and eventually it helped him. He returned to work after Dr. Bradley treated him. TX 21-24. He said that he continues to have problems at

work using a pencil, and has had these problems for a long period of time. He testified that he felt that the therapy helped him out but the pain does not go away. Sudden movements of his neck still sometimes causes pain that is like a jab in the back. TX 25. He still gets cramps, numbness of the fingers in the right hand if he holds something too long, or writes a letter to his sister, TX 26. He said that on one particular occasion, he tried to use a machete to cut bushes but it kept falling out of his hands. TX 26,27. He is fifty three years old. He said that he continues to take aspirin because of the pains, and he hasn't sought any other medical treatment, since Dr. Bradley. TX 27. He testified that he was given exercises to perform and that he was not doing them regularly, TX 31. He said that he was having trouble at work because the numbness and "funny feelings" in his hands which cause him to stop punching information in the computer. He is afraid he could punch some erroneous information and he will have to go back and erase it. He is afraid of making errors, and is doing the work slower. He also has difficulty when he twists his neck suddenly and looks up and when he turns to the right. TX 30-33. He testified that he has been suspended from his regular duties because they claimed that he sent a container to the wrong ship, he was not as quick as he used to be and he was making errors. TX 34. He concluded by saying that he never had any prior injuries to his neck, shoulder or right arm. He never made a claim for workers' compensation, automobile accident or any other injury to those parts of his body. TX 34.

Mr. Chavez was cross-examined by Respondent's counsel. TX 36. Mr. Chavez stated that he was a hatch man about 3-3 1/2 years prior to the accident. He is currently

working in the receiving and delivery office, and has been there for the last few months. He said that his job was changed because the employer claimed that he made errors during his employment as a sender and hatch man. He was suspended from his regular job. He testified that he went to the Union but they "procrastinated" and did not do anything. Mr. Chavez testified that he returned to work in June or July 1996. He said that he was accused of making errors prior to his injury. TX 40. He worked as a hatch checker from June of 1996 until November of 1997 when he was shifted to the office. He tried not to pass up overtime or work during the period when he was a hatch checker. He did turn down work or overtime on two or three occasions during that period. TX 40. He stated that a hatch checker was part of a gang that has a responsibility on a ship until it is done being loaded. He said that he made about $75,918.00 for the year prior to his injury. TX 41. He admitted that he made $77,331.00 after his injury. He said that due to retirements he moved up on the Hatch Checker List. TX 42. He also worked as a sender and hatch man but was not sure of the percentage of each. In the office, he wrote or made entries in a computer while seated at a desk. He said that his medical conditions interfered with his work but he had a family to support and that is the reason he goes work. TX 46,47. After his injury of March 11, 1996, he continued to work and also worked the next two days. Mr Chavez testified that the first day he was out of work was March 14, 1996. He worked two days sometime thereafter and returned to full time in July, 1996. He said that he could not work during that period because he was in pain, had swelling, could not use his head. TX 49. He testified that the swelling stayed there for a considerable

period, perhaps more than a month. He was in the booth and tried to write but couldn't because of neck pain. He informed the dock boss and he was ordered to see another doctor. TX 50. He was sent to Dr. Bradley, who gave him heat pad therapy to his shoulder, electrical stimulation to his shoulder, and gave him exercises. He stated that during this period, he could not move his head in the field, as required, to look for containers, or twist around since he had pain. TX 53. He admitted that he was working more as a sender. As a hatch checker he had to raise his head and move it side to side with some degree of speed, which he did not think he could do. TX 54. Mr. Chavez testified that he drove to therapy or his son took him. He stayed home when not receiving therapy. TX 54. While at home, he slept, got up and moved around, drove occasionally. He stated that driving a car was easier than working because there was no pressure and not as much turning or stretching. TX 55. He said that the difference between being at home was that at work you had to do things right. He testified that if something fell or he moved his head he could not perform his duties at work. Dr. Bradley's notes listed his job as a lot of driving of forklifts, a truck, working with containers, and sometimes loading and unloading things of that nature He reported that a checker on occasion drives a hi-lo from one hatch to another, until he finishes the bay he is working on. Mr. Chavez testified that the hi-lo's do not have power steering TX 59. He testified that he did not think his problem had gotten any better and had worsened. He doesn't have the soreness anymore, but feels discomfort in the back of his neck. He feels that he is not able rotate his head all the way as well as feeling "funny feelings" from his arm into his fingers and cramps like electrical shocks also going to the

fingers. He stated that the pain starts in the forearm and goes to the hand from the right shoulder. His right wrist gets swollen, his fingers cramp and get numb. He said that the most containers loaded on a ship is 20-24 in an hour. Some guys do 12-15. He said that you have to write quickly to verify that it is the right container. The hustlers generally move faster than the crane so that there might be three or four hustlers with containers on them sitting on the string pieces. He was asked if he had time to record the six digit number in the time that it is sitting there, he said sometimes it's possible, sometimes it's not. TX 64-66.

Deposition Testimony of Stanley Lysick

Mr. Lysick testified that he was employed by Universal Maritime Services for thirty-two years and is the Manager of the Safety and Health Department in Port Newark, Berth 51. He stated that Universal currently operated Berths 51 through 59 He stated that this was a container terminal, loading and unloading ocean going vessels. There is a warehouse, and the container portion is outside. He stated that he was familiar with Universal's entire operation. He stated that a checker's responsibility is to either count or verify, through either numbers or marks, commodities that are moving with in the terminals. A hatch checker's responsibility is to indirectly direct the loading or unloading of a particular ship's hatch. TX 03-07. The ships that pull into Universal's facility are mainly container ships, a container ship is divided up into bays or hatches, one being at the bow and bay 30 or hatch 20 would be basically at the stern of the ship, and within those hatches it's honeycombed, within those honeycombs are containers that are loaded into

these cells, anywhere from 20 feet, 40 feet or 45 feet lengths. There are divisions within the hatches for support and to prevent the containers from moving. TX 08. When a ship is being loaded, containers are placed into the various different hatches where there are gangs that are assigned to load or unload a particular hatch. Normally after the hatch is completely loaded the gang goes on deck to load the deck. The hatch checkers duties are to direct the crane operator as to the cell where the containers are and to annotate and verify that the container went on the vessel. On the reefers, discharging, he would direct the hustler drivers to wherever the containers or equipment has to go, the specific location, when it's discharged off the vessel. The checker sits in a booth on a bar type stool, where the hustlers can pass him and he can give them direction. He has a hand held radio to communicate with the crane operator. In the loading process the containers are in the container field, and the checker sends them to the ship with a sequence sheet. The hustler is a small tractor that pulls the container on a chassis or a flatbed up to the side of the ship. TX 07-12. The hatch checker is sitting close to the longshoremen on the spring piece near the crane, communicating with the hustler drivers in the discharge and with the crane operator in loading. The hustler driver pulls up to the booth and is either given a voice command or a card with directions on it. The booth is similar to a tollbooth. TX 12,13. The booth is enclosed with a bar stool type arrangement with a slant board allowing the checker to sit or stand. The hatch checker verifies the numbers of containers by looking at slightly above eye level through the windows where he can see the number and has a sequence sheet and a stow plan to work with. Usually 20 to 30 containers move in an hour. The hatch checker, in the loading process, has a

stow plan, the schematic of the bay that he is working with the container number in it and he directs the crane operator to put the container into the right cell. The sender directs the hustler driver from the field, to pull up the proper container to the hatch checker. The container has a number and its weight that corresponds to the stow plan and sequence sheet that the hatch checker has. In loading, the hatch checker gives the crane operator a command telling him what cell the container goes into. The crane operator has the same stow plan, and the proper numbered container is loaded into the right place. TX 13-18. The hustler driver then is told by the hatch checker to get another specific numbered container. TX 19. When the process is completed, the loading or unloading of containers starts again, since there is enough equipment operators so there is very little lead time. The hustlers move slowly until they get into the field. The hatch checker process operates at a steady pace, and loading 20 to 30 containers per hour is within the industry standard. The hatch checker doesn't have to walk around, twist, bend, or stoop. TX 19-23. Mr. Lysick testified that he knew Mr. Chavez. He worked as a sender, which is a field checker. A field checker works in a pickup truck with a hand held radio, in communication with the hatch checker, with an equipment operator driving a top handler, and the hustler with the equipment coming to the area to pick up containers. The sender directs the top loader what container is going next. He gives a verbal command or a hand signal after he verifies the container numbers. He has to sometimes walk 30 to 40 feet, but he spends more time in his truck, and does no lifting, climbing twisting or turning other to get into the truck. The majority of the time he is at eye level to verify the containers. There is a seal checker that verifies that the

container hasn't been opened. The seal is at eye level so that the checker can read it, and verify the number. The seal checker is also in a pickup truck, and his job does not require any lifting. TX 23-28. He said that Mr. Chavez currently works in the office because his performance as a hatch checker was well below standard. He had sent containers to the wrong vessel, which created delay. He brought Mr. Chavez's personal file which contained a Union Grievance because of the reassignment, which had been denied. Mr. Chavez disagreed and felt that he was able to do the job. He did not express any physical incapacity that would prevent him from being a hatch checker. He stated that Mr. Chavez's performance had cost the company money, and caused customer dissatisfaction. He also said that the Collective Bargaining Agreement limited the work that Mr. Chavez could perform and specifically excluded heavy manual labor. TX 28-33.

Mr. Lysick was cross-examined by Claimant's counsel. He testified that the hatch checkers work in pairs in 12 hour shifts. They agree on the hours that they will work between themselves and they are responsible for 120 to 180 containers per shift. He said that there is no written policy on how many mistakes a person could make before he gets a written reprimand. He said that he would not expect to see a mistake or more than one mistake in ten vessels. A ship takes 10 or 12 hours to load. He stated that they do not quantify how many mistakes are made. The paper work indicated that Mr. Chavez made one mistake in 1993, 1995, 1997, and there were others, which was below the one mistake in 10 ship that he testified was acceptable. He could not verify the number of mistakes that Mr. Chavez made. TX 33-39.

Appendix E

The decision to reassign Mr. Chavez was made on a consensus by the manager, general manager, and the shop steward. He testified that the hatch checker has from one to three minutes to look at the stationary container before the hustler takes it. The glass booths are moved by hi-lo operated by the hatch checker. A loading crane picks up the container directly in front of the hatch checker, who records the numbers. He has an eight and one half by eleven sheet with squares in it, a "Bay Plan", each represents a container, and a container number in the square, he matches the numbers on the bay plan. He then tells the crane operator to move the container to the specific square. TX 39-43. On unloading, there is a "bay plan" with the discharge destination, and as the container comes out it is loaded on a flatbed, with the notation that it is off the ship. He said that there was no person to prevent ice forming on the cranes, or clean the crane. The checkers all make the same rate of pay, and the clerks and booth clerks make a higher rate. He said that a checker could work as many hours a he wanted to. A clerk is limited in the number of hours he works, limiting Mr. Chavez's pay.

On re-direct Mr. Lysick stated that Mr. Chavez had a long time performance problem reported by the field men, longshoreman, ILA members. A performance evaluation is created for each vessel. The Union had defended Mr. Chavez, there was a letter dated October 23, 1995 signed by Anthony La Forgia, vessel superintendent who copied ten people that Mr. Chavez was doing a crossword puzzle when he was supposed to be communicating with a crane operator. The hatch checker is the last check to see that containers are properly routed. If the hatch checker does not see a mistake the container is not correctly routed. TX 44-50.

Appendix E

Attached to Mr. Lysick's testimony was Employers Exhibit Number 10. This exhibit contained complaints, a written warning relative to Mr. Chavez's performance as a hatch checker starting in July 8, 1993. The complaints included being late for the Vessel Fiona, failure to make cards with correct container numbers and stowage positions, giving out cards out of sequence, causing delay for cargo and expense to the company. A grievance dated May 1, 1997 requesting Mr. Chavez's return to his checker position. In his grievance Mr. Chavez admitted that he had received warning but claimed that not all the mistakes were his fault. The company agreed to start Mr Chavez April 21, 1997 as a hatch checker and continue him in that position unless his performance was not acceptable. He was not given back pay. He next filed a grievance that he was removed from a hatch checker's job due to bad performance allegedly, he filled a wrong stowage position when the container was actually in location 302 in the yard. Mr Chavez filed another grievance requesting return to his former hatch checker's job. The Company listed mistakes in loading the Cape Henry-June 3, 1997, Marched-July 5, 1997, Cape Henry-September 25, 1997 and NOL Risso-October 17, 1997. Mr. Chavez's grievance was denied on February 28 1998 personal records. The record also contained other negative comments relative to Mr Chavez's performance.

Deposition testimony of Steven L. Nehmer, M.D.

Dr. Nehmer testified that he is Board Certified in Orthopedic Surgery, and is the Chairman of the Department of Orthopedic Surgery at Irvington General Hospital, and on staff at Union Hospital and Overlook Hospital. He performs

surgery on average two times per week. He provides evaluations for both plaintiffs' and respondents' attorneys. He described his examination process which includes a medical history, examination and review of medical records sent to him. TX 03-08. He testified that he examined Mr. Chavez on two occasions, April 1, 1996 and June 3, 1996. The Doctor was given a history by Mr. Chavez of being struck on the neck and right shoulder area by a piece of ice that fell from a crane while he was talking to the operator. This accident occurred on March 11, 1996. He complained of pain in the right side of his neck and shoulder The doctor stated that he recorded five degrees of movement of his neck, and when distracted, by the Doctor walking to the side of the room, he would turn his neck spontaneously. The Doctor recorded that he was diffusely tender to light touch all over his neck and shoulder area, with light fingertip pressure, which the Doctor said he did not based upon his experience, seemed reasonable for someone to be having. TX 08-12. The diffuse pain he claimed was atypical of any trauma or reasonable injury because where he was stuck, there should be more tenderness in the actual area stuck, and he was seeing him three weeks after the accident. The pain claimed with fingertip pressure did not seem appropriate. There was no noticeable bruising or swelling. He next asked him to move his right shoulder, and he would not. He would not allow the doctor to move his arm to test his passive range of motion. However during the course of the examination he did move his arm approximately 30 degrees from the vertical, hanging position. The Doctor looked at his shoulder, and did not find any deformity, swelling, or atrophy present in the musculature in his upper extremity. The Doctor obtained x-rays for the neck and shoulder which were reported as negative for

fracture or dislocation. His conclusion was that Mr. Chavez was engaging in symptom magnification of a contusion by history. TX 08-15. The doctor testified that he had a basic understanding of the duties performed by a checker, which he described as a paperwork type job, recording numbers, documentation of things going on a ship. His medical opinion was that Mr. Chavez could return to work as of the date of his first examination, and was not in need of further treatment. TX 16. The Doctor's second examination was performed on June 3, 1996 He was not working at that time and told the doctor that he was getting physical therapy and had an appointment to see Dr. Bradley on June 11, 1996. Mr. Chavez stated that his condition had improved. In May of 1996 Mr. Chavez had an MRI performed of his right shoulder and cervical spine and in April 26, 1996 he has an EMG test which revealed "Carpal Tunnel Syndrome" which in the doctor's opinion was not related to the March 11, 1996 contusion he suffered. The MRI did not show and evidence of any radiculopathy or radicular problem coming from the neck area where the injury had occurred. The Doctor testified that carpal tunnel does not result from a neck or shoulder injury. TX 18. The MRI studies reported that the quality was limited due to patient motion, and was a non diagnostic examination of the right shoulder and cervical spine In his examination of June 3, 1996, the patient attempted to cooperate rotating his neck to 25 degrees to the right and 70 degrees to the left, with minimal tenderness present at this time. His shoulder was actively and passively abducted to 90 degrees, at a right angle from the body. He complained of paresthesias in his hands, more in the right than the left, associated with cramps, without objective neurological findings. The Doctor said that the paresthesias of the hands

was the prime symptom of carpal tunnel syndrome. Mr. Chavez's muscle strength and sensation were intact, as demonstrated by his testing. TX 20. The Doctor still opined that Mr. Chavez was engaging in symptom magnification, but not as pronounced as in the first examination. TX 21. He was given the report, dated July 8, 1996 of Dr. Raymond Koval an impartial examiner of the U.S. Department of Labor, at the deposition. He summarized the report as indicating that Mr. Chavez could return to work, and was in fact working. Dr. Koval did not find evidence of carpal tunnel syndrome. He also opined that it would be difficult to understand that how the injury could cause carpal tunnel syndrome. TX 22. The Doctor was given a February 24, 1997 electro diagnostic study for interpretation, he stated that the report concluded that there may be carpal tunnel syndrome present. The report did not show cervical radiculopathy. He was given a February 27, 1997 MRI of Mr. Chavez's cervical spine which stated that motion artifacts during the test interfered with the clarity of the test. The findings were disc bulging and degenerative spurring at C3-C4. The Doctor Stated that degenerative changes in the cervical spine can cause radicular problems however the radiologist indicated spurring without neural compression which would be an unexpected finding, and there was no evidence of a discrete disc herniation, foramina disease or cordial abnormality. The Doctor was given a description of a hatch checker sender and seal checker jobs work activities. He testified that it was his medical opinion that Mr. Chavez had the functional capacity to return to work on the date of his first examination. TX 22-27.

Appendix E

Dr. Nehmer was cross-examined by Claimant's counsel. Dr. Nehmer said that there are cases where he doesn't find disability but there are plenty of cases where he has found permanent disability. TX 28. He testified that he examined twice and did not provide treatment. In the first examination, he was provided x-ray reports from Dr. Perez dated March 14, and a medical form from Union Square Medical. TX 28-31. Dr. Nehmer stated that normal cervical rotation is 80 to 85 degrees on each side. and normal shoulder flexation is 150 to 160 degrees, abduction is 150 to 160 degrees. In April 1, 1996 Mr. Chavez's numbers were lower and he again attributed this to symptom magnification, and he could not estimate the percentage of motions that were due to symptom magnification. However Mr. Chavez was able to move his neck spontaneously with no sign of pain. TX 32. Dr. Nehmer testified that he was a little vague about the accident, he stated that he felt pain initially, however he did continue working and did not seek medical attention right away. TX 33. He said that there was nothing about dizziness or about being shocked or being moved. He just felt pain and the next was worse. He said Dr. Koval's report stated that he talked about being dizzy for a few minutes, but not being unconscious. Dr. Nehmer said that dizziness is not generally an orthopedic type problem, and his medical opinion was that a person would not normally get dizzy from being hit in the neck or shoulder, he does not see patients for dizziness. TX 33-35. He was asked if he asked how hard he was impacted, and the Doctor replied that three weeks later it would not have made a difference in his opinion. The Doctor stated that the fact that he remained at work that day and did not seek medical attention for three days, therefore the magnitude was not like being hit by a two by

four. He said the impact pain would be generally worse the next day, sometimes it is worse immediately, but it's not consistent. TX 36,37. He said that the impact was substantial across the back of the neck a person would not wait three days to seek medical attention. He was receiving therapy before Dr. Nehmer's first exam, April 1, 1996 and through his second exam June of 1996. He said that the reduction in pain and the increase in range of motion in the second exam may have been a reflection of the physical therapy, the time or a decrease in symptom magnification. He felt at the second examination that he was still magnifying symptoms. The doctor was asked if an injury could cause a decrease in lateral rotation to 90 degrees, as in the second examination, he said that he believed that the bulk of the restriction was due to symptom magnification. On the first exam he had some paresthesias, which is a symptom of carpal tunnel syndrome, which he said could not be produced by this injury. It could only be produced by an impact to the that specific area. He did not believe that the injury could have caused carpal tunnel syndrome. He was asked for a reading of the MRI taken May 16, 1996: "Mild Bursal surface fraying of the anterior distal supraspinatus" meant. He said that the supraspinatus is a tendon that forms the biggest part of the rotator cuff tendon, and the bursal surface would be the top part of it opposed to the underneath of it which would be the joint. The cause of this condition was due to a degenerative finding on a 50 year old male. The radiologist description "Evidence of a prior Hill-Such's fracture with a normal appearing anterior labrum" The radiologist felt that the humeral head, the boney part showed some evidence of that type of fracture, the anterior labrum is front part of the surface of the glenoid where the ligaments that hold the shoulder

together attach, and the radiologist stated that it's normal. TX 44-46. He said that the plain x-ray was a superior modality for soft tissue injury, and it did not show any evidence of a Hill-Such's fracture. The doctor was asked if the impact would cause aggravation of these injuries. He stated that Mr. Chavez had mild degenerative changes in his shoulder, normal for a 50 year old male, and he did not see any aggravation, and the impact would not cause any fraying. The conditions described in the MRI would not cause loss of motion of the shoulder. He said that Mr. Chavez had 40 degrees of observed rotation of his neck, the motion necessary to look up at a container and down at a piece of paper, and he had enough neck motion, side to side and up and down, to do his checker's job based upon his observation. TX 44-50 The carpal tunnel syndrome could have given him trouble writing, however he did not give a history of any orthopedic problem, and he did not recall him complaining about a hand problem. At the time of the second visit he complained about paresthesias of his hands. He said that the fact that the carpal tunnel symptoms began after the accident does not mean that they are related. There was temporal relationship in his complaints but he did not opine that this created a possibility of causation. He said that when he first saw him April 1st, he did not require physical rehabilitation, and he did not feel that the improvement reported was really attributable to physical therapy. He concluded that it was his opinion that the bulk of Mr Chavez's complaints were symptom magnification. TX 50-54. After review of the testimony of Dr. Nehmer, I find him to be creditable, and accord his opinion that Mr. Chavez was exaggerating his symptoms great weight.

Appendix E

Medical Evidence Submitted bar Dr. Munoz

On April 26, 1996, Dr. Munoz conducted nerve conduction testing and the results were listed as, "Findings suggestive of Carpal Tunnel Syndrome on both sides." Dr. Munoz wrote that Mr. Chavez was under his care for "1. Acute Severe Spine Sprain/strain 2. Acute Severe R shoulder Sprain 3. Cervical Radiculopathy". Treatment notes start March 14, 1996, three days after the accident. A history was given of a piece of ice falling on his right side of the neck/upper back. He had pain on the above areas after the accident and the pain got worse the following morning. Dr. Munoz made the above diagnosis. Dr. Munoz found tenderness of right paracervical areas and right upper trapezius muscles, and reduced range of motion. On April 15, 1996 Dr. Munoz reported stiffness cramps of the right hand, carpel tunnel syndrome, right shoulder motion 90 degrees, extension 15, flex 150 degrees. On April 26, 1996 Dr. Munoz reported feels better has numbness of the extremities, shoulder better abduction 145 degrees flex about 180 degrees. He reported x-rays of cervical spine and right shoulder. Mr. Chavez saw the doctor approximately 18 times ending on May 7, 1996. A form indicating that the Employer authorized treatment with Union County Orthopedic group dated May 10, 1996, Mr. Chavez came under the care of Dr. Douglas Bradley on May 21, 1996. Dr. Bradley reported that a MRI of the right shoulder demonstrated mild bursal surface fraying of the anterior and distal supraspinatus and degenerative disc changes throughout the cervical spine. On June 11, 1996 he reported marked improvement with therapy program, and he could return to work next week. Mr. Chavez did not appear July 18, 1996, and on February 3,

1997 for his medical appointments, the Doctor reported the neck improved with therapy, and that he had symptoms relating to his hands. A cervical Spine MRI dated May 16, 1996 demonstrated degenerative changes at C4-5, Cx-6 and Cx-7 levels but no demonstration of a HNP.

Medical Report of Dr. Koval

Dr. Raymond P. Koval examined Mr. Chavez on July 8, 1996, for an impartial examination, at the request of the U.S. Department of Labor. Dr. Koval stated that Mr. Chavez was age 51 at the time of the examination, 5'10" in height, and weighed 300 pounds. The history given was that on March 11, 1996, "a block of ice fell down, striking him on the right side of his neck and right shoulder." He was dizzy for a few minutes and not unconscious. He said a few days later when the pain continued to be bad he went to Dr. Nunoz. He said that he attempted to go back to work, he did not remember the dates, he could not really do it and changed doctors. Dr. Koval stated that there were no abnormal reflexes, negative Tinel's compression, and Phalen's tests. There was no atrophy of the arms or forearms. The Doctor's physical examination of the cervical spine revealed tenderness in the right neck-shoulder junction and upper trapezius fibers on the right. There was a full range of active and passive motion, but on the extremes, he complained of discomfort. He was able to follow the examiner's head, neck and finger throughout a full range, but again, on extremes he had some discomfort. Compression tests were negative. There were no muscle spasm. In the supine position, one could flex the neck and bring the body up without complaints of pain. The rest of the cervical spine exam was within normal

limits. The examination of the right shoulder revealed there was tenderness in the upper trapezius fibers on the right and the base of the right side of the neck, as stated. There was a full range of active and passive motion, but the extremes through all motions of the right shoulder caused discomfort. He is a right handed person. With his arms at his sides, one could internally and externally rotate the shoulder without complaints of pain. There was non clicking heard on palpation. The muscle testing revealed essentially no weakness. The rest of the examination of the upper extremity was negative. Dr. Koval reviewed a MRI dated May 16, 1996, reporting that it was non-diagnostic due to motion. Review also revealed no evidence of a large HNP, minimal degenerative changes at C3-4. The shoulder MRI reveals mild bursal surface fraying of the anterior and distal supraspinatus tendons, evidence of a prior Hill-Sachs fracture with a normal appearing anterior labrum, motion obscuring sufficient evaluation. Dr. Koval did not feel that he had any work related injury and did not need any further care, and that the injury could not cause Carpal Tunnel Syndrome. I give Dr. Koval, the independent medical examiner's medical opinion great weight, he reported objectively, listing positive findings and that Mr. Chavez was not disabled. His opinion was supported by the MRI findings although compromised by movement, were read as negative.

Medical Evidence Submitted by Doctors Tevlin and Meyers

Mr. Chavez was sent for a consultative examination by his counsel, performed by and signed by Doctors William Tevlin and David Myers on October 2, 1996. Their history

indicated that Mr. Chavez was seen at the Union Medical Center Emergency room. However the record reveals that he did not get treatment until the third day after the accident, further he was treated by a Dr. Munoz, not Dr. Guillermo. Mr. Chavez had returned to work by October 2, 1996. These doctors concluded that:

> The objective medical findings noted in the body of this report have resulted in a permanent orthopedic disability of 21% impairment of the whole person.

The Act does not make a provision for a "whole person" impairment rating pursuant to a schedule. Further this report was based upon Mr. Chavez's complaints which Dr. Nehmer found not creditable, and the independent examining physician Dr. Koval found normal ranges of motion in the right cervical and shoulder area. The objective testing although compromised by movement did not demonstrate objective pathology for the continuing complaints to the right shoulder or neck.

The following exhibits were entered into the record Claimant's Exhibits A through P. The Employer submitted Exhibits 01-12.

DISCUSSION FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences

from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968) *reh'g. den.* 391 U.S. 929 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). It must be recognized that all factual doubts must be resolved in Claimant's favor. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969), *cert. den.* 395 U.S. 921 (1970). It also has been consistently held that the Act must be construed liberally in favor of Claimant, and Claimants are to be accorded the benefit of all doubt. *Durrah v. WMATA*, 760 F.2D 320 (D.C. Cir. 1985).

Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Golden v. Eller*, 620 F.2d 71 (5th Cir. 1980). However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "*prima facie*" case. The Supreme Court has held that a "*prima facie*" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment. Moreover, the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *United States Industries/Federal Sheet Metal, Inc., et al. v. Director, OWCP*, 455 U.S. 608, 102 S.C. 1318 (1982). The presumption, though, is applicable once Claimant establishes that he has sustained an injury, i.e., harm to his body. *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985). To rebut this presumption the employer must introduce

substantial evidence to show that the Claimant's injury did not arise out of employment. *Kier v. Bethlehem Steel Corporation*, 16 BRBS 128 (1984). When employer produces such substantial evidence, the presumption drops out of the case and does not control the result. In such cases, I must weigh all of the evidence relative to the causation issue, resolving all doubts in Claimant's favor. *MacDonald v. Trailer Marine Transport Corp., et al.*, 18 BRBS 259 (1986).

Claimant contends he has been temporarily totally disabled continuously from March 11, 1996, the date of his accident to the date that he returned to work, June 16, 1996.

In the Employer's Brief, there is an admission that Mr. Chavez has clearly presented sufficient proof by direct evidence and concession to raise entitlement the statutory presumption at 33 U.S.C. Section 920(a) and as such shifted the burden of production to the respondent Universal. Universal contends that the testimony and medical reports of Dr. Nehmer and the medical report of the impartial examining physician, Dr. Koval provide rebuttal evidence of Mr. Chavez's claim of injury after Dr. Nehmer's first examination, April 1, 1996

Claimant's counsel takes a position that Mr. Chavez's testimony is clear that subsequent to this injury and for approximately the next three months he was totally disabled, until his return to work June 16, 1996.

Mr. Chavez's testimony was not creditable relative to the extent of his injury. He did not receive treatment immediately after the accident. He was first out of work

March 14, 1996, three days after the accident. He claimed that he had difficulty sleeping, pains all over, and that his injury would not let him work. TX 15-18. He also claimed continuing problems grabbing a fork, holding a pencil, numbness, cramps in the right hand. He complained that his pain was so severe that he cried. TX 18, 19. He claimed that he still gets cramps, numbness in the fingers if he holds something too long, or writes a letter to his sister. TX 26. Then he said that he tried to use a machete to cut bushes, but it kept falling out of his hands TX 26, 27. Mr. Chavez's attempt to use a machete to cut bushes seems more than inconsistent for a person with such severe pains that he testified to, but is consistent with his statement that he takes aspirin and hasn't sought any other medical treatment. TX 27. I do not find his description of the reason he could not work creditable. He said that he could not work during that period because he was in pain, had swelling, could not use his head. TX 49. The swelling stayed there for a good while, more than a month. He was in the booth and tried to write but couldn't because of neck pain. He stated he had "funny feelings" and they became cramps, he was unable to write, grasp from the floor, the pain became so severe that he cried. He did not tell Dr. Nehmer or Koval about these complaints or that sometimes he sits at the table and tries to grab the fork and he gets cramps and numbness in the right hand mostly. He did not tell Dr. Nehmer or Doctor Koval that he had to rub his right hand because his fingers became numb. That he still gets pains in the back of his neck when he works or when he wakes up after sleep. He did not indicate to the doctors that at work, he had trouble twisting his neck when he was looking for containers, cramps when writing with a pencil. He did not tell these physicians that he could

not clean himself. Dr. Nehmer testified that his medical opinion was that Mr. Chavez was engaging in symptom magnification, based upon his two examinations. Dr. Koval stated that there were no abnormal reflexes, negative Tinel's compression, and Phalen's tests. There was no atrophy of the arms or forearms. The Doctor's physical examination of the cervical spine revealed tenderness in the right neck-shoulder junction and upper trapezius fibers on the right. There was a full range of active and passive motion, but on the extremes, he complained of discomfort. He was able to follow the examiner's head, neck and finger throughout a full range, but again, on extremes he had some discomfort. Compression tests were negative. There were no muscle spasm. In the supine position, one could flex the neck and bring the body up without complaints of pain. The rest of the cervical spine exam was within normal limits. The examination of the right shoulder revealed there was tenderness in the upper trapezius fibers on the right and the base of the right side of the neck, as stated. There was a full range of active and passive motion, but the extremes through all motions of the right shoulder caused discomfort. He is a right handed person. With his arms at his sides, one could internally and externally rotate the shoulder without complaints of pain. There was non clicking heard on palpation. The muscle testing revealed essentially no weakness. The rest of the examination of the upper extremity was negative. Dr. Koval reviewed a MRI dated May 6, 1996, reporting that it was non-diagnostic due to motion. Review also revealed no evidence of a large HNP, minimal degenerative changes at C3-4. The shoulder MRI reveals mild bursal surface fraying of the anterior and distal supraspinatus tendons, evidence of a prior Hill-Sachs fracture with a normal

appearing anterior labrum, motion obscuring sufficient evaluation. Dr. Koval did not feel that he had any work related injury and did not need any further care, and that the injury could not cause Carpal Tunnel Syndrome I give Dr. Koval's opinion great weight, he reviewed the objective evidence and issued a thorough and well reasoned report.

Mr. Chavez was sent for a consultative examination by his counsel to Doctors William Tevlin and David Myers on October 2, 1996. Their statements must be contrasted with Dr. Koval's and Dr. Nehmer's findings of a full range of motion of the cervical spine with tenderness to the right neck-shoulder on October 2, 1996. Their history indicated that Mr. Chavez was seen at the Union Medical Center Emergency room. However the record reveals that he did not get treatment until the third day after the accident, further he was treated by a Dr. Munoz, not Dr. Guillermo. Mr. Chavez had returned to work by October 2, 1996. Further this report was based upon Mr Chavez's complaints, which Dr. Nehmer found not creditable, and the independent examining physician Dr. Koval found normal ranges of motion in the right cervical and shoulder area. The objective testing although compromised by movement did not demonstrate objective reasons for the continuing complaints to the right shoulder or neck junction. There was a full range of motion but the extremes caused discomfort, there was no motor or sensory disturbances, no abnormal reflexes, negative Tinel's compression and Phalen's tests. The objective testing by Doctors Nehmer and Koval lead to the conclusion that Mr. Chavez was not creditable in discussion his alleged pain and symptoms above.

Appendix E

I do not find Doctors William Tevlin and David Myers report well reasoned or accurate. Their history indicated that Mr. Chavez was seen at the Union Medical Center Emergency room. However the record reveals that he did not get treatment until the third day after the accident, further he was treated by a Dr. Munoz, not Dr. Guillermo. Mr. Chavez had returned to work by October 2, 1996. These doctors relied upon Mr. Chavez' description of his symptoms and I found that he engaged in symptom magnification and his alleged symptoms was not creditable.

Mr. Lysick testified creditably relative to Mr. Chavez's job duties. Mr. Lysick's detained description of the Hatch checker's job duties is entirely creditable. After consideration of his statements and the medical findings after examinations by Dr. Koval and Nehmer I conclude that Mr. Chavez had no medical impediment to perform his duties as a hatch checker or clerk for employer.

On re-direct Mr. Lysick stated that Mr. Chavez had a long time performance problem reported by the field men, longshoreman, ILA members. A performance evaluation is created for each vessel. The Union had defended Mr. Chavez, there was a letter dated October 23, 1995 signed by Anthony La Forgia, vessel superintendent who copied ten people that Mr. Chavez was doing a crossword puzzle when he was supposed to be communicating with a crane operator. The hatch checker is the last check to see that containers are properly routed. If the hatch checker does not see a mistake the container is not correctly routed. He said that Mr. Chavez currently works in the office because his performance as a hatch checker was well below standard. He had sent

containers to the wrong vessel, which created delay. He brought Mr. Chavez's personal file which contained a Union Grievance because of the reassignment, which had been denied. Mr. Chavez disagreed and felt that he was able to do the job. He did not express any physical incapacity that would prevent him from being a hatch checker. Mr. Chavez has not been creditable relative to his job performance.

It is obvious that Doctor Nehmer and Dr. Koval presented compelling and well reasoned evidence, specifically their range of motion findings, that Mr. Chavez disability relative to the accident of March 11, 1996 ended April 1, 1996. However Dr. Koval found tenderness to the right neck-shoulder and upper trapezius fibers on the right on July 8th, 1996. There was an authorization to consult with Dr. Bradley dated May 10, 1996. Considering these facts it is reasonable for the Employer to pay for Dr. Bradley's May 14, 21, 1996 visits and the May 16, 1996 MRI's of the cervical spine and right shoulder to rule out any pathology. Mr. Chavez has evidence of Carpal Tunnel Syndrome, however both Dr. Koval and Dr. Nehmer creditably opine that the injury could not have caused carpal tunnel syndrome. The Employer is not obligated to treat this condition, Accordingly the medical record demonstrated that as of May 22, 1996 Mr. Chavez medical condition had been totally investigated and he was capable of returning to work.

Claimant's attorney, having been partially successful in prosecuting this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his/her fee petition. Within thirty (30) days of the receipt of

this Decision and Order, he/she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after the informal conference. Services performed prior to that date should be submitted to the District Director for his consideration.

Therefore I find that the Employer's obligation to continue medical and temporary total disability benefits ended May 22, 1996.

Appendix E

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following Order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS ORDERED THAT:

1. Claimant is entitled to compensation based upon his average weekly wage for total temporary disability from March 11, 1996 to May 22, 1996. The actual amount shall be determined by the District Director. The parties assert that the average weekly wage is $1,459.97, leading to a compensation rate of $782.44.

2. Claimant is entitled to payment of all medical expenses pursuant to §7 until May 22, 1996.

s/ Paul H. Teitler
PAUL H. TEITLER
Administrative Law Judge

Dated: JUL 14 1998
Camden, New Jersey

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 12, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-1540

RHADAMES CHAVEZ,

Petitioner

v.

UNIVERSAL MARITIME SERVICE CORPORATION; SIGNAL MUTUAL INDEMNITY ASSOCIATION; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OF AMERICA

On Appeal from Decision of the U.S. Department of Labor
Benefits Review Board
(BRB No. 00-0504)

Present: BECKER, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*

Appendix F

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT

s/ [illegible]
Circuit Judge

Dated: 12 FEB 2002

Supreme Court, U.S.
FILED
JUL 17 2002

No. 01-1685

In the Supreme Court of the United States

RHADAMES CHAVEZ, PETITIONER

v.

UNIVERSAL MARITIME SERVICE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether employer-sponsored medical examinations constitute an impermissible basis for denying compensation, under Section 7 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 907, for medical treatment that was not necessary to treat any injury covered by the LHWCA, where petitioner did not present that argument to the Benefits Review Board (Board) or the court of appeals.

2. Whether the scope of petitioner's claim under 33 U.S.C. 908(c) for permanent partial disability benefits, which was denied on other grounds, would otherwise have been evaluated as a "scheduled" impairment under 33 U.S.C. 908(c)(19), or as a non-scheduled impairment under 33 U.S.C. 908(c)(21), where petitioner did not present that argument to the Board or the court of appeals.

3. Whether petitioner's Fifth Amendment due process rights prohibited the Board from vacating the decision of the administrative law judge (ALJ) and remanding the case to the same ALJ, where petitioner presented no evidence of ALJ bias or vindictiveness, and where petitioner failed to raise that claim before the Board or the court of appeals.

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In the Supreme Court of the United States

No. 01-1685

RHADAMES CHAVEZ, PETITIONER

v.

UNIVERSAL MARITIME SERVICE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the decision is noted at 276 F.3d 576 (Table). The decisions and orders of the Benefits Review Board (Pet. App. 8a-16a, 26a-33a) and the administrative law judge (Pet. App. 17a- 25a, 34a-66a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2001. A petition for rehearing was denied on February 12, 2002 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on May 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires employers to compensate covered employees for disabilities caused by work-related injuries, 33 U.S.C. 904, and to provide reasonable and necessary medical treatment "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a); 20 C.F.R. 702.401 *et seq.* See generally 33 U.S.C. 908(a), (b), (c) and (e) (prescribing compensation levels for permanent total disabilities, temporary total disabilities, permanent partial disabilities, and temporary partial disabilities). Claims under the LHWCA are filed with a district director of the Labor Department's Office of Workers' Compensation Programs (OWCP), who investigates and attempts to resolve them. 33 U.S.C. 913(a), 919(a) and (c); 20 C.F.R. 702.221. Unresolved disputes may then be transferred to an administrative law judge (ALJ), 33 U.S.C. 919(c) and (d); 20 C.F.R. 702.301-702.317, 702.348, whose decisions may be appealed to the Benefits Review Board, and the Board's decisions are reviewable by the courts of appeals. 33 U.S.C. 921(a), (b) and (c); 20 C.F.R. 702.391, 801.102.

1. Respondent, Universal Maritime Service Corporation, employed petitioner as a hatch checker to monitor and record cargo containers as they were loaded onto shipping vessels. Pet. App. 37a, 42a. While at work on March 11, 1996, petitioner was struck on his neck and right shoulder by a large piece of ice that fell from a crane. *Id.* at 2a, 20a, 37a. Petitioner claims that he momentarily "blanked out" and experienced pain from the impact, but he continued working until March 14, 1996, when he sought medical attention. *Id.* at 37a-38a, 40a.

Respondent Universal Maritime paid petitioner temporary total disability and medical benefits from March 14, 1996, until April 1, 1996. Pet. App. 9a, 36a. During March and April of 1996, petitioner met three times with his treating physician, Dr. Guillermo Munoz. Dr. Munoz ordered x-rays of petitioner's cervical spine and right shoulder, and he diagnosed petitioner with acute spine strain, acute right shoulder sprain, cervicular radiculopathy, and carpal tunnel syndrome on both sides of the body. *Id.* at 54a.

On April 1, 1996, petitioner was examined by Dr. Steven Nehmer, an orthopedic surgeon, who concluded that petitioner "was engaging in symptom magnification," that he "could return to work" immediately, and that he "was not in need of further treatment." Pet. App. 48a-49a. Dr. Nehmer also opined that petitioner's carpal tunnel symptoms could not have been caused by the alleged injury to his neck and shoulder. *Id.* at 52a.

On May 14, 1996, petitioner was examined by another orthopedic surgeon, Dr. Douglas Bradley, who then became petitioner's authorized treating physician. Petitioner told Dr. Bradley that he could not grasp, stretch his right arm, clean himself, or use a machete to cut bushes. Pet. App. 22a-23a. In response, Dr. Bradley ordered a magnetic resonance imaging (MRI) examination, which was performed on May 16, 1996. *Id.* at 22a. His diagnostic report predicted that if petitioner's MRI results were "grossly okay," he "would get [petitioner] into a more formal rehab program * * * and let them really work on conditioning and strengthening and just work on his motion overall." C.A. App. 43. On May 21, 1996, Dr. Bradley interpreted the MRI results as showing degenerative changes in the spine and mild surface fraying of the right shoulder,

but no evidence of a large herniated disc. Pet. App. 54a-55a. "Given the fact that presumably what happened this time aggravated pre-existing changes," Dr. Bradley said he "would definitely get him into rehab, as I mentioned in the last report." C.A. App. 44.[1]

On June 3, 1996, Dr. Nehmer again examined petitioner and again concluded that he was engaged in symptom magnification, though less seriously than during the April examination. Pet. App. 49a-50a. Dr. Nehmer also interpreted the May 16 MRI data as revealing no medical problem derived from petitioner's neck area. *Id.* at 49a. Upon petitioner's request, the Department of Labor appointed an independent orthopedic surgeon, Dr. Raymond Koval, to provide an impartial assessment of petitioner's medical condition. *Id.* at 55a.[2] After examining petitioner on July 8, 1996, Dr. Koval concluded that petitioner had no work-related injury, that his alleged neck and shoulder injury could not have caused carpal tunnel syndrome, and that he did not need further medical care. *Id.* at 29a, 56a.

On June 16, 1996, petitioner returned to work as a hatch checker. On October 2, 1996, at his counsel's request, petitioner was examined by Dr. William Tevlin and an orthopedic surgeon, Dr. David Myers. Pet. App.

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[1] On June 11, 1996, Dr. Bradley recorded that petitioner showed "marked improvement with the therapy program. He's definitely moving his [shoulder] and everything much better than before." C.A. App. 44.

[2] See generally 33 U.S.C. 907(e) ("In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate."); 20 C.F.R. 702.408.

56a, 59a. Those doctors also reviewed Dr. Bradley's diagnosis, the May 16 MRI data, a March 14 x-ray examination, petitioner's physical therapy records, Dr. Nehmer's June 5 report, and Dr. Koval's July 8 report. C.A. App. 54. On that basis, Drs. Tevlin and Myers concluded that petitioner had a "permanent orthopedic disability of 21% impairment of the whole person." Pet. App. 57a.

In November 1997, petitioner was reassigned from his position as hatch checker to an office-based clerk's position. Pet. App. 30a, 40a. According to respondent's safety manager, Stanley Lysick, petitioner's reassignment represented a consensus decision by the manager, the general manager, and the shop steward, and was based on petitioner's mistakes before and after his injury, including one incident in which petitioner neglected his responsibilities while completing a crossword puzzle. *Id.* at 45a-47a.

2. Petitioner filed a claim for LHWCA benefits in August 1996. On May 13, 1997, the OWCP district director transferred petitioner's case for formal proceedings before an ALJ.[3] Petitioner sought to recover permanent partial disability benefits after June 16, 1996, and temporary total disability and medical benefits from April 2, 1996, until June 16, 1996. See Pet. App. 36a. After an evidentiary hearing, the ALJ did not grant petitioner's request for permanent partial disability benefits, *id.* at 65a-66a, and he awarded temporary total disability benefits and medical expenses only from April 2, 1996, until May 22, 1996. *Id.* at 34a-66a. The ALJ found petitioner's testimony "not creditable relative to the extent of his injury," for

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[3] See 33 U.S.C. 919 (describing hearing procedures for LHWCA claims); 20 C.F.R. 702.316-702.317.

reasons including: his having worked for three days before seeking medical help, his attempt to cut bushes with a machete, discrepancies between his testimony at the hearing and prior statements to Drs. Nehmer and Koval, and Dr. Nehmer's description of symptom magnification. *Id.* at 59a-62a. The ALJ also did not credit the medical report of Drs. Tevlin and Myers, which he held was not "well reasoned or accurate" because it contained factual misstatements and relied on petitioner's exaggerated account of his symptoms. *Id.* at 63a. In contrast, the ALJ gave "great weight" to the opinions of Drs. Nehmer and Koval that petitioner had no work-related injury, and that any symptoms of carpal tunnel syndrome were not caused by the neck and shoulder injury. *Id.* at 53a, 56a, 62a. The ALJ also credited Dr. Nehmer's opinion "that [petitioner] was exaggerating his symptoms." *Id.* at 53a.

Respondent Universal Maritime appealed to the Board, seeking to vacate petitioner's award of temporary total disability and medical benefits from April 1, 1996, until May 22, 1996. Petitioner cross-appealed, asserting that he deserved permanent partial disability benefits after June 16, 1996, and temporary total disability and medical benefits from May 22, 1996, until June 16, 1996. In August 1998, the Board issued an opinion agreeing with the ALJ that permanent partial disability benefits were not warranted, but vacating the ALJ's decision to cease temporary total disability and medical benefits as of May 22, 1996. Pet. App. 26a-33a.

The Board rejected petitioner's argument for permanent partial disability benefits because "the evidence which the [ALJ] credited establishes that [petitioner] was capable of performing his usual work as a hatch checker, and that his removal from this position [in November 1997] was not related to his work injury."

Pet. App. 30a. With respect to temporary total disability and medical benefits, however, the Board found that the ALJ's cut-off date—May 22, 1996—was inconsistent with the evidence he had deemed credible. *Id.* at 30a-32a. Specifically, the Board noted that Dr. Nehmer had found no injury as of April 1, 1996; that Dr. Bradley had recommended physical therapy until June 17, 1996; and that Dr. Koval's examination on July 8, 1996, proved nothing about petitioner's status on May 22, 1996. *Id.* at 29a-30a. The Board also noted that medical benefits could be awarded without proof of disability if they were reasonably necessary for treating a work-related injury. *Id.* at 31a. Accordingly, the Board remanded the case to the ALJ to "address Dr. Bradley's recommendation that [petitioner] undergo physical therapy and his judgment that such therapy was beneficial to [petitioner]." *Id.* at 32a.

3. On remand, the ALJ again awarded petitioner no permanent partial disability benefits, Pet. App. 20a, and again awarded temporary total disability benefits and medical expenses from March 11, 1996, until May 22, 1996. *Id.* at 17a-25a. The ALJ explained his May 22 cut-off date because, although Dr. Nehmer had found no disability on April 1, "[petitioner] was entitled to an objective test, the MRI," *id.* at 23a, which was performed on May 16 and evaluated on May 21 (see p. 3, *supra*), and which "was reported as negative." Pet. App. 23a. After analysis of the MRI was complete, however, the ALJ "deemed * * * further care * * * unnecessary," including Dr. Bradley's prescribed physical therapy, which was based on petitioner's exaggerations regarding his condition. *Id.* at 22a-24a; see *id.* at 24a ("I allowed the MRI to rule out any and all disability and concluded that the Employer was responsible until May 22, 1996. To extend treatment further

* * * would be an unjustifiable expense to the Employer.").

Petitioner appealed the ALJ's decision, and the Board affirmed in an unpublished opinion. Pet. App. 8a-16a. With respect to permanent partial disability, the Board reiterated its earlier finding that petitioner "did not establish that the loss of his usual work was due to the work injury." *Id.* at 10a. The Board also declined to extend petitioner's temporary total disability and medical benefits, because it held that the ALJ had permissibly credited a combination of MRI data (which indicated no injury as of May 21, 1996) and Dr. Nehmer's medical judgment (which indicated no injury as of April 1, 1996). *Id.* at 11a-12a, 14a. "The administrative law judge thus found that Dr. Bradley's recommendation for further physical therapy, based in large part on [petitioner's] subjective complaints, was not necessary." *Id.* at 14a. See generally 33 U.S.C. 921(b)(3) ("The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.").

6. On appeal to the Third Circuit, petitioner argued: (i) that his testimony and the reports of Drs. Munoz, Bradley, and Tevlin proved that he was permanently partially disabled (Chavez C.A. Br. 7-8); (ii) that the documentary evidence supporting his reassignment was insufficient (*id.* at 8-9); (iii) that "it seems illogical" for the ALJ to allow compensation for Dr. Bradley's MRI examination but to deny the necessity of physical therapy prescribed thereafter (*id.* at 10-11); and (iv) that it would appear "more logical" to credit the judgment of Dr. Bradley, the authorized treating doctor, as corroborated by petitioner's testimony (*id.* at 11-12). In an unpublished opinion, the court of appeals rejected

those arguments and affirmed the Board's decision. Pet. App. 1a-5a. The court held that the ALJ had exclusive authority to weigh evidence and draw factual conclusions, and that the decision to credit evidence from Drs. Nehmer and Koval over evidence from other sources provided adequate support for the ALJ's judgment. *Id.* at 3a-4a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Moreover, petitioner has not previously raised any of the arguments he now asks this Court to consider. Accordingly, the petition should be denied. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Mitchell* v. *Director, OWCP*, 855 F.2d 485, 491 n.7 (7th Cir. 1988) ("Absent exceptional circumstances, we do not consider issues that were not raised before the Board.").

1. In the proceedings below, petitioner asserted that the ALJ's factual findings—that petitioner's reassignment was unrelated to his injury, and that medical care was unnecessary after May 22, 1996—were not supported by substantial evidence. See Chavez C.A. Br. 3-13. The court of appeals rejected those factual objections (Pet. App. 4a-5a), and petitioner has not renewed them here. Pet. 11-14.[4]

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[4] In any event, the ALJ's findings were amply supported by Lysick's testimony with respect to petitioner's work reassignment, and by the MRI data and the opinions of Drs. Nehmer and Koval with respect to his medical status on May 22, 1996. Pet. App. 9a-

Instead, petitioner raises three legal issues, none of which was presented to the Board or to the court of appeals. First, he asserts an entitlement to all medical expenses after April 1, 1996, because the ALJ "relie[d] heavily on an employer-sponsored examination [by Dr. Nehmer] to deny" petitioner's claim for expenses after May 22, 1996. Pet. 13. Petitioner acknowledges that appellate courts should generally "defer to * * * administrative law judges" (Pet. 12) in their assessments of witness credibility and factual conflicts, and he does not ask the Court to revisit any particular factual determinations in this case. See p. 9, *supra*. Rather, petitioner apparently suggests (Pet. 12-13) that employer-sponsored medical examinations, as a matter of law, present an invalid basis for limiting a claimant's medical benefits. No court has so flatly disfavored employer-sponsored medical examinations, however; such examinations often (as in this case) are deemed to have important evidentiary value. Furthermore, the ALJ's conclusions here rest on a *combination* of Dr. Nehmer's views, Dr. Koval's independent analysis, and Dr. Bradley's MRI data—which is why petitioner received medical benefits through May 22, 1996, even though Dr. Nehmer found no injury as of April 1, 1996. The court of appeals correctly declined to reexamine the ALJ's appraisal of that conflicting testimony and disputed medical evidence.

Petitioner's proposed analogy between the ALJ's legal decision in this case and "an employer's physician who has stopped treatment" (Pet. 13) is unpersuasive. With respect to the latter, "when an injured employee has been told by [the employer's physician] that he is

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15a, 30a-31a. Such inherently fact-bound determinations do not warrant review by this Court.

recovered from his injury and requires no further treatment, he has * * * been refused treatment by his employer, and he needs only to establish that treatment he subsequently procures * * * was *necessary* treatment for the injury." *Atlantic & Gulf Stevedores, Inc.* v. *Neuman*, 440 F.2d 908, 911 (5th Cir. 1971) (emphasis added).[5] But that principle does not allow claimants to recover medical expenses—like petitioner's expenses after May 22—that are deemed *unnecessary*. Indeed, petitioner's argument curiously suggests that an ALJ's finding that expenses were unnecessary might somehow (if based on an employer-sponsored examination) support a claim to recover those expenses under the LHWCA. Petitioner cites no case overturning an ALJ's factual findings simply because they relied on an employer-sponsored medical examination, however, and no such result is warranted here.

2. Petitioner also seems to argue (Pet. 14) that the court of appeals wrongly evaluated his permanent partial disability claim as a "scheduled" impairment, under 33 U.S.C. 908(c)(1)-(20), instead of applying 33 U.S.C. 908(c)(21)'s provision for "[o]ther cases." The LHWCA lists a schedule of particular bodily injuries for which benefits may be awarded only for a set number of weeks, 33 U.S.C. 908(c)(1)-(20). In "[o]ther cases," involving other types of injuries, benefits are allowed for the period of a claimant's diminished wage-earning capacity, 33 U.S.C. 908(c)(21). See generally

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[5] Accord *e.g.*, *Roger's Terminal & Shipping Corp.* v. *Director, OWCP*, 784 F.2d 687, 693 (5th Cir.), cert. denied, 479 U.S. 826 (1986); *Slattery Assocs., Inc.* v. *Lloyd*, 725 F.2d 780, 784 (D.C. Cir. 1984); *Shahady* v. *Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1983); cf. 33 U.S.C. 907(d)(1)(A) (stating that employees may not recover medical expenses unless they request such treatment from their employer).

Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268, 269-270 (1980) (describing pertinent statutory provisions).[6]

As petitioner admits, "[t]he Third Circuit did not address the issue presented on permanent partial disability." Pet. 14. In fact, the Third Circuit and the Board did not distinguish between scheduled impairments and "[o]ther" impairments because petitioner never raised that argument, see pp. 8-10, *supra*. Moreover, the distinction is irrelevant because petitioner's claim fails under either system of compensation. Petitioner cannot claim a scheduled impairment, under 33 U.S.C. 908(c)(1)-(20), because the LHWCA's list includes neither neck nor shoulder injuries.[7]

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[6] Petitioner apparently believes that his disability should be viewed as a "whole person" impairment. Pet. 14; see Pet. App. 57a (quoting similar language from the report of Drs. Tevlin and Myers). But the term "whole person," which the LHWCA itself does not use, appears only in American Medical Association guidelines for evaluating physical impairment; under the LHWCA, those guidelines apply only in determining "compensation for retirees who suffer from occupational diseases that do not become disabling until after retirement." *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 155 (1993); see *id.* at 154-159 & n.9 (differentiating statutory compensation schemes for scheduled, non-scheduled, and "whole person" disabilities); see 33 U.S.C. 908(c)(23); 33 U.S.C. 910(d)(2); 33 U.S.C. 902(10). As the ALJ noted, such "whole person" impairment ratings do not pertain to scheduled injuries under 33 U.S.C. 908(c)(19), Pet. App. 57a, nor do they apply to "[o]ther cases" under 33 U.S.C. 908(c)(21).

[7] Petitioner invokes (Pet. 14) the Fifth Circuit's opinion in *Pool Co.* v. *Director, OWCP*, 206 F.3d 543, 547-548 (2000). But *Pool* held only that employees with bodily injuries that do not appear on the LHWCA's schedule must recover under the "other cases" provision, 33 U.S.C. 908(c)(21), even if their symptoms affect body parts that are on the schedule. Petitioner has not endeavored to explain how that principle might apply to his case.

Petitioner also cannot recover under 33 U.S.C. 908(c)(21)'s provision for "[o]ther cases," because he has not shown any decreased wage-earning capacity. In June 1996, petitioner returned to work as a hatch checker, and the ALJ credited Lysick's testimony that petitioner was later reassigned because of poor job performance that was not related to his neck and shoulder injury. Pet. App. 20a, 63a-64a. The Board affirmed that factual finding (*id.* at 10a, 30a-31a), and so did the court of appeals (*id.* at 4a).[8] Because petitioner has not challenged the factual basis for denying his permanent partial disability claim, because no pertinent circuit conflict appears, and because petitioner has not previously raised the argument he now asserts, this Court should deny review.

3. Finally, petitioner claims that "[t]he practice of remanding to the same [ALJ]" when an ALJ's decision is vacated for further consideration "should be reviewed" as a possible due process violation. Pet. 14. See generally 33 U.S.C. 921(b)(4) ("The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action."). Here, however, both petitioner and respondent *requested* such a remand, see Pet. App. 29a ("We agree with the parties' contentions that this case must be remanded to the administrative law judge for further findings * * * ."), and petitioner never raised any due process objection during the proceedings below.

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[8] Although the court of appeals' opinion did not specifically mention Lysick's testimony, it adverted to such evidence by noting that the ALJ's decision was not only based on expert reports, but "also included statements of lay persons," Pet. App. 4a, like Lysick.

The proposed basis for petitioner's argument is *United States* v. *Resendez-Mendez*, 251 F.3d 514 (5th Cir. 2001), which applied a presumption of "vindictiveness" to a district judge's decision that imposed a harsher criminal sentence after a court of appeals remanded the case. There is no basis for applying that presumption here. Petitioner cites no case extending such principles of vindictiveness to administrative determinations, and this Court has noted a "presumption of honesty and integrity in those serving as [administrative adjudicators]." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Indeed, other contexts clarify that an ALJ is not disqualified from remand proceedings simply because he was reversed on an earlier ruling. *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236-237 (1947); see 2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.8, at 86 (3d ed. 1994).

Furthermore, in this case, the ALJ's ruling on remand was identical to (not harsher than) his previous decision, see Pet. App. 25a, 66a, and petitioner could not have been "punished" for appealing the ALJ's earlier decision because *respondent* filed that appeal; petitioner only filed a cross-appeal. *Id.* at 27a. The present facts thus yield no articulable basis to suspect, much less presume, unconstitutional vindictiveness. Cf. *Alabama* v. *Smith*, 490 U.S. 794, 799 (1989) (explaining, in the criminal context, that a presumption of vindictiveness is only warranted in cases with a reasonable likelihood "that the increase in sentence is the product of actual vindictiveness").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2002

(3)

Supreme Court, U.S.
FILED
JUL 29 2002
OFFICE OF THE CLERK

No. 01-1685

In The

Supreme Court of the United States

RHADAMES CHAVEZ,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORPORATION; SIGNAL MUTUAL INDEMNITY ASSOCIATION; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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13P9

QUESTIONS PRESENTED

1. Whether when a ruling by the administrative law judge that an injured employee is fully recovered is based on an employer sponsored examination, the employee has been refused treatment by the employer and is entitled to reimbursement of reasonable medical expenses incurred for continued treatment with employee's physician authorized by the employer pursuant to Sec 907 under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.A. Sec. 901 *et seq.*

2. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, under permanent partial disability relating to a loss of use of a body part, what factors determine whether benefits are calculated under 908(c)19 or (c)21?

3. Whether it is a violation of due process for review boards in the federal system to remand a case to the same administrative judge. Is there not a presumption of vindictiveness or loss of objectivity on the part of the reversed judge?

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COUNTERSTATEMENT

Petitioner labored more than 32 years on the docks. He "never had any prior injuries to his neck, shoulder or right arm" until a big chunk of ice barreled down from a high crane and struck him on March 11, 1996. Pet.App.27a, 39a.

Petitioner did not leave his job that day despite the severe impact and pain he experienced. He wanted to work to support his family and do his job and had through the years worked as much overtime as possible. He never wanted to miss work. Id. at 40a. It was not his intention to apply for anything. Petitioner thought that the pain may go away. But after two days of severe pain, petitioner could no longer continue working and sought medical help from Dr. Guillermo Munoz. Id. at 37a-38a.

The ALJ judge discounted both treating physicians' findings and relied on employer-retained Dr. Steven Nehmer who opined that "the fact that he [petitioner] remained at work that day and did not seek medical attention" indicated he was not hurt since a "person would not wait three days to seek medical attention." The ALJ based primarily on Dr. Nehmer's opinions, found petitioner was not "creditable" and engaged in "symptom magnification." Id. at 51a-52a, 59a-60a.

On April 1, 1996, (two weeks after the injury and while in the care of Dr. Munoz), petitioner was given an employer-sponsored examination by Dr. Nehmer. Dr. Nehmer, in his report, accused petitioner of "symptom magnification" Id. at 49a. Dr. Nehmer discounted the diagnosis of the treating physician, Dr. Munoz, i.e., acute severe spine strain, acute severe right shoulder sprain and radiculothopy due to the accident. Dr. Nehmer opined petitioner needed no treatment and "could return to work" on April 1st. Id. at 49a.

On April 26, 1996, Dr. Munoz confirmed that petitioner also suffered from carpal tunnel syndrome on both sides, a

condition petitioner had never suffered before the impact of the ice. After three days on the job, he just could not continue with the pain and sought an authorized specialist to help him.

On May 14, 1996, petitioner was examined by Dr. Bradley, his new employer authorized treating physician. On May 21, 1996, Dr. Bradley found, via the MRI objective evidence, multi-level degenerative disc changes throughout the cervical spine;mild surface bursal surface fraying involving the right shoulder and of a prior Hill-Sachs fracture. Dr. Bradley concluded that petitioner's injury aggravated preexisting changes and prescribed a rehabilitation program.

On June 3, 1996, while petitioner was under the authorized treatment with Dr. Bradley, Dr. Nehmer conducted yet another employer-sponsored examination. Petitioner told Dr. Nehmer that his condition improved with physical therapy. Dr. Nehmer noted paresthesias and confirmed carpal tunnel syndrome. Dr. Nehmer opined that the carpal tunnel syndrome was not related to the March 11th contusion petitioner suffered. Id. at 49a. Dr. Nehmer noted a decrease in pain and the increase in range in motion of the neck. He acknowledged that physical therapy may have been a factor in these changes but also, time, or a "decrease in symptom magnification." Id. at 52a.

Dr. Nehmer did find that there were degenerative changes in petitioner's shoulder but the doctor did not see any aggravation by the impact (of a big chunk of ice barreling down from a high crane] to this condition. Dr. Nehmer did not find evidence of a Hill-Sachs fracture. Id. at 521-53a.

On June 11, 1996, Dr. Bradley noted improvement with the therapy and released petitioner to work as of June 16, 1996 and continued to treat him through February 1997.

On July 8, 1996, Dr. Raymond Koval from the Labor Department noticed tenderness on the right side of neck-shoulder and upper trapezius fibers on the right (as did petitioner's treating physicians). However, Dr. Koval found no

work-related injury. Dr. Koval found no sign of carpal tunnel syndrome either [contradicting Dr. Nehmer]. Id. at 50a.

But agreeing with treating physician,Dr. Bradley, Dr. Koval noted a prior Hill-Sachs fracture thus, again contradicting. Nehmer who did not find a Hill-Sachs fracture.

Later on appeal, the Review Board ("Board") remanded the case back to the ALJ because "Dr. Koval's opinion does not support the termination of benefits" as of May 22, 1996, the date the ALJ had first ruled as the cut-off date. Id. at 29a.

On October 2, 1996 , Dr. William Tevlin and Dr. David H. Myers several months after the accident found a permanent orthopedic disability of 21% impairment of the whole person.

On February 2, 1997, Dr. Bradley noted more pain the impacted areas, worsening of numbness of petitioner's index and middle fingers and increased pain on the base of his neck. Dr. Bradley continued to treat plaintiff through February 1997.

In November 1997, petitioner was transferred to a desk job. Stanley Lysick employed by respondent employer, testified that petitioner "works in an office because his performance as a hatch checker was well below standard" and cost the company money. Id. at 45a. Petitioner testified he was not as quick as he used to be because of his injury and he made errors.

As a clerk, petitioner continued to have pain in his shoulder, arm and hand and difficulty in twisting his neck. He had trouble punching information in the computer in his new position. Id. at 39a. Mr. Lysick acknowledged that petitioner's pay as a clerk was lower because "a checker could work as many hours as he wanted to. A clerk is limited in the number of hours he works, limiting Mr. Chavez's pay." Id. at 46a.

Based on the first employer-sponsored examination report by Dr. Nehmer, respondents refused petitioner's medical and disability benefits in the middle of authorized treatment on April 1, 1996. This cut-off date was while petitioner was being treated by Dr. Munoz and later by Dr. Bradley. On May 10,

1996, the employer had given written authorization for continued treatment with Dr. Bradley.

The ALJ relied heavily on the employer-retained Dr. Nehmer's findings and to Dr. Koval's opinion stating that "[i]t was obvious that Doctor Nehmer and Dr. Koval[whom the Board later discounted] presented compelling and well-reasoned evidence, specifically their range of motion studies, that Mr. Chavez[']s disability relative to the accident of March 11, 1996 ended April 1, 1996." App. 64a.

On July 14, 1998, the ALJ awarded temporary total disability and medical benefits until May 22, 1996, but not the requested June 17th when petitioner's treating physician released him to go to work. The ALJ ignored the objective medical findings of petitioner's treating physicians and the subjective complaints of the petitioner to his treating physician to allow for full treatment.

As to permanent partial disability, the ALJ merely stated "the Act does not make a provision for a "whole person" impairment rating pursuant to a schedule." Id. at 57a.

The Board noted on the first appeal that the ALJ did not "explicitly determine whether claimant has established his entitlement to partial disability payments." However, the Board did not remand the partial disability issue for further analysis.

On August 17, 1998, the Board vacated the cut-off date of May 22, 1996 because it questioned Dr. Koval's findings on which the ALJ gave "great weight" and the fact the ALJ did not "address Dr. Bradley's recommendation that claimant undergo physical therapy and his judgment that such therapy was beneficial to claimant, or his subsequent treatment of claimant." Id. at 29a, 32a, 56a.

The ALJ also discounted petitioner's subjective complaints as "symptom magnification" and, moreover, did not consider the combined effects of the injury. Petitioner continues to suffer and seeks relief.

ARGUMENT

In view of its beneficient purposes, Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. Sec.901 et seq. must be given broad and liberal construction in conformance with its purpose. The Act must be liberally construed in favor of the employee and any doubts should generally be in favor of the injured worker. Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968 (CA4 1951); Old Dominion Stevedoring Corp. v. O'Hearne, 218 F.2d 651 (CA4 1955).

I. THE ALJ DID NOT GIVE THE PROPER WEIGHT TO THE AUTHORIZED TREATING PHYSICIANS' FINDINGS AND PETITIONER'S COMPLAINTS AND MISAPPLIED THE PURPOSE AND SPIRIT OF THE ACT.

Despite respondents assertions, it is evident that this petition was filed because the ALJ did not weigh the evidence properly and arrived at erroneous factual conclusions. Petitioner does not claim that employer-sponsored medical examinations are invalid "as a matter of law." (Resp. P.12). But, rather, pursuant to the meaning of the Act, more weight must be given to a treating physicians' findings based on objective findings and the subjective complaints of their patients. The Supreme Court directed that "[w]e afford greater weight to a treating physician's opinion because he is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Consolidated Edison Co. v. NLRB*, 305 U.S. 107, 229 (1938). Even if , *arguendo*, there was no objective evidence, in *Northcutt v. Califano*, 581 F.2d 164, 166-167 (CA8 1978), the Eight Circuit, held that the "ALJ may not disregard the claimant's subjective complaints of pain simply

because there is no objective evidence in support of such complaints."

The ALJ would not see past the "symptom magnification" accusations of employer doctor, Dr. Nehmer and the fact petitioner did not run to a doctor right after the injury. The ALJ did not consider the continued treatment necessary according to the treating physician even after petitioner returned to work. "[a] claimant's ability to return to work is not determinative of his entitlement to medical benefits if he remained in need of treatment for his work injury.*Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Dr. Nehmer assigned gradations of "symptom magnification." Later on, Dr. Nehmer opined that petitioner engaged in a "decrease of symptom magnification."(emphasis added). Does this mean that the doctor admits that petitioner was indeed injured?

Respondents (Resp. p.14) evidently overlooked the case in the petition (Pet. p.13) *Sir Gean Amos v. Atlas Tile & Marble, Inc. v. Director, 164 F.3d 780 (CA9. 1999).*

Using a *res ipsa loquitur*-type argument, when a large chunk of ice comes barreling down from a high crane and hits one's neck and shoulder, it is not so farfetched to opine that such an impact caused the poor soul to hurt badly *if not killed* and to aggravate of any preexisting condition. Moreover, petitioner developed injury to his arm and hand after the injury.

This Court should give pause as to the credibility of such findings which are based on buzz words and the unsupported conclusion that a person is not hurt if he does not run for medical aid immediately. The ALJ did not liberally construe the statute in conformance with its purpose and weigh the evidence in favor of the employee as mandated by The Act.

II. THERE IS CONFUSION AMONG THE ALJ'S, BOARDS, AND CIRCUITS IN THE INTERPRETATION OF THE ACT IN CLASSIFYING PERMANENT PARTIAL DISABILITY.

Respondent misunderstands petitioner's position in this issue. The court of appeals did not address permanent partial disability. The ALJ stated, in discounting this claim, "the Act does not make a provision for a "whole person" impairment pursuant to a schedule." Pet. App. 57a. Also, the Board found that the ALJ "did not explicitly determine whether claimant established his entitlement to partial disability benefits." Thus, the issue is before the Court.

Twenty-two years ago, this Court in *Potomac Electric Power Co. v. Director*, 449 U.S. 268(1980) reading the Act strictly ruled that "[we] are not free to read this language as though it granted the employee an election" between scheduled and non-scheduled injuries. But, the Act with its beneficent purpose, surely would allow for employees, if applicable, to choose what category is most advantageous for them financially, 908(c)19 or (c)21 or even the whole people's impairment. Otherwise the Act would be discriminatory and defeat its own purpose. In his dissent in *Potomac*, Justice Blackman, focused on the purpose of the Act and urged adoption of "a liberal construction of the statute so as to avoid the amazingly incongruous result approved by the Court."

Moreover, petitioner's injury to his neck and shoulder caused a partial loss of his arm and hand. If, hypothetically, he had not lost income in his transfer, there is still a conflict in the courts as to whether petitioner is entitled to benefits under the schedule for the partial disability of his arm and hand arising from a neck and shoulder injury. There is nothing in Sec. 908 and (c)19 that mandates scheduled injuries resulting from non-scheduled injuries to be excluded.

Moreover, since petitioner suffered injuries throughout including the aggravation of preexisting conditions, the whole person analysis would be appropriate.

Thousands of dedicated injured workers are deprived of benefits because either they did not lose income or their injuries do not fit into cubby-holes.

III. THE TONE OF THE ALJ'S OPINION DEMONSTRATED AN "UNSHAKABLE COMMITMENT" TO THE DENIAL OF THE WORKER'S CLAIMS.

Throughout his opinion, the judge overly accused petitioner of "symptom magnification" then "decreased symptom magnification" fancy words for "lying". Throughout his opinion he called the petitioner in essence a liar, i.e., a malingerer. This worker was hit by a big chunk of ice at high speeds from a high crane and the ALJ accuses this worker of lying. The ALJ blindly gave great weight to the employer's doctors who actually disagreed on important issues and discounted the treating physicians' opinion and treatment plan.

In *Sarchet v. Chater*, 78 F.3d 305(CA& 1996), the Court observed that '[the tone of the administrative law judge's opinion suggests she may have an unshakable commitment to the denial of this applicant's claim." In *Withrow et al. v. Larkin*, 421 U.S. 35 (1975), this Court reiterated that [n]ot only is a biased decisionmaker constitutionally unacceptable but, "our system of law has always endeavored to prevent even the probability of unfairness."

The facts reveal at least an appearance of impropriety as to the ALJ's findings. On remand, the ALJ was "unshakable" in a decision that undermined the purpose of the Act.

CONCLUSION

This case presents serious recurring questions that affect and have affected the health and welfare of thousands of workers. Petitioner has come this far to respectfully and fervently request this Court grant Certiorari to insure hardworking workers injured on the job receive the benefits to which they are entitled under the Act.

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July 2002